Supreme Court, U.S.
FILED
991680 APR 17 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

CITY NEWS AND NOVELTY, INC.,

Petitioner,

v.

CITY OF WAUKESHA, WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

THE JEFF SCOTT OLSON LAW FIRM, S.C.
JEFF SCOTT OLSON
Counsel of Record
131 W. Wilson St., Suite 1200
Madison, WI 53703
(608) 283-6001

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

135 pp

QUESTIONS PRESENTED

I. WHICH PARTY BEARS THE BURDEN OF PERSUASION WHEN A LITIGANT CHALLENGES, AS AN UNCONSTITUTIONAL PRIOR RESTRAINT, A MUNICIPAL ORDINANCE WHICH REQUIRES A SPEAKER TO OBTAIN A CITY LICENSE BEFORE ENGAGING IN EXPRESSIVE ACTIVITY PROTECTED BY THE FIRST AMENDMENT?

II. IS A LICENSING SCHEME WHICH ACTS AS A PRIOR RESTRAINT REQUIRED TO CONTAIN EXPLICIT LANGUAGE WHICH PREVENTS THE EXERCISE OF UNBRIDLED DISCRETION IN FIXING THE PENALTIES FOR ITS VIOLATION?

III. IS A LICENSING SCHEME WHICH ACTS AS A PRIOR RESTRAINT REQUIRED TO CONTAIN EXPLICIT LANGUAGE WHICH PREVENTS INJURY TO A SPEAKER'S RIGHTS FROM WANT OF A PROMPT JUDICIAL DECISION?

PARTIES

The Petitioner is City News and Novelty, Inc., a Wisconsin corporation, the plaintiff in the circuit court, the appellant in the Wisconsin Court of Appeals, and the petitioner in the Wisconsin Supreme Court. City News and Novelty, Inc., has no parent corporation or subsidiaries.

The Respondent is the City of Waukesha, Wisconsin, a Wisconsin municipality, the licensing entity, the defendant in the circuit court, the appellee in the Wisconsin Court of Appeals, and the respondent in the Wisconsin Supreme Court.

The State of Wisconsin has not been a party to the proceedings below, the Attorney General of the State of Wisconsin has been served with documents throughout the proceedings in order to give the State an opportunity to appear and defend the challenged provisions, as is required by Wisconsin state law. (See *State ex. Rel. Smith v. City of Oak Creek*, 131 Wis. 2d 451, 457, 389 N.W.2d 366, 368 (Ct. App. 1986), affirmed 139 Wis. 2d 788, 407 N.W.2d 901 (1987)).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THE WISCONSIN COURT OF APPEALS COMPROMISED AN IMPORTANT FIRST AMENDMENT SAFEGUARD WHEN IT INTERPRETED *FW/PBS, INC. V. CITY OF DALLAS* TO REQUIRE ONE WHO CHALLENGES A LICENSING SCHEME, WHICH ACTS AS A PRIOR RESTRAINT, TO BEAR THE BURDEN OF PROOF IN DEMONSTRATING THAT THE ORDINANCE VIOLATES THE FIRST AMENDMENT 5

A. It Is Unlikely that this Court Intended to Alter The Allocation of the Burden of Proof 6

B. The Requirements of *Freedman* Are Still Binding Precedent 8

TABLE OF CONTENTS – Continued

Page

II. WAUKESHA'S LICENSING ORDINANCE DOES NOT CONTAIN EXPLICIT, OBJECTIVE STANDARDS TO PREVENT THE EXERCISE OF UNLAWFUL DISCRETION 11

A. Provisions which Allow the City to Choose Between Mild and Severe Punishments Without Standards to Guide that Choice Confer Unbridled Discretion Upon City Officials 12

III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER THE GUARANTEE OF PROMPT JUDICIAL REVIEW THAT MUST ACCOMPANY A LICENSING SCHEME MEANS A PROMPT JUDICIAL DETERMINATION OR SIMPLY THE RIGHT TO PROMPTLY FILE FOR JUDICIAL REVIEW 13

A. The Court Should Grant Certiorari to Consider the Role that Preserving the Status Quo May Play When A Municipality Lacks the Power to Require a State Court to Determine a License Case Promptly 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

11126 Baltimore Boulevard v. Prince George's County, Maryland, 58 F.3d 988 (4th Cir. 1995) (*en banc*) 10

Chesapeake B&M, Inc. v. Harford County, Maryland, 58 F.3d 1005 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1010 (1995) 16

City News and Novelty, Inc. v. City of Waukesha, 231 Wis. 2d 93, 604 N.W.2d 807 (Ct. App. 1999)..... 1

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 9, 10, 11, 13

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 5

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 5, 7

Freedman v. Maryland, 380 U.S. 51 (1965)..... *passim*

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990)...*passim*

Jersey's All-American Sports Bar, Inc. v. Washington State Liquor Control Board, 55 F.Supp. 2d 1131 (1999) 8

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 5

Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358 (11th Cir. 1999)..... 16

Marks v. United States, 430 U.S. 188 (1977).....9, 10

Riley v. National Federation of the Blind, 487 U.S. 781 (1988) 9

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)... 5, 8, 11

TABLE OF AUTHORITIES – Continued

Page

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 5

Staub v. City of Baxley, 355 U.S. 313 (1958) 11

TK's Video v. Denton County, 24 F.3d 705 (5th Cir. 1994) 16

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 5

Wolff v. City of Monticello, 803 F. Supp. 1568 (D. Minn. 1992) 16

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the Wisconsin Court of Appeals, in *City News and Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 604 N.W.2d 870 (Ct. App. 1999), which was given binding effect in the State of Wisconsin by the decision of the Wisconsin Supreme Court to deny review on January 18, 2000.

OPINIONS BELOW

The order of the Wisconsin Supreme Court is unpublished and is reproduced in the Appendix to this petition. The decision of the Wisconsin Court of Appeals is published as *City News and Novelty, Inc. v. City of Waukesha*, 231 Wis. 2d 93, 604 N.W.2d 807 (Ct. App. 1999), and is reproduced in the Appendix to this petition.

The Wisconsin Court of Appeals entered its decision on October 20, 1999. The petitioner sought review by the Wisconsin Supreme Court, and its petition for review was denied January 18, 2000.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech. . . . "

STATUTES INVOLVED

Chapter 68 of the Wisconsin Statutes governs municipal administrative procedure and review of municipal administrative decisions. The provisions of Chapter 68 are reproduced in the Appendix to this Petition.

ORDINANCES INVOLVED

The City of Waukesha, Wisconsin, regulates adult oriented establishments by means of a municipal licensing ordinance, § 8.195. The provisions of Waukesha Ordinance § 8.195 are reproduced in the Appendix to this Petition.

STATEMENT OF THE CASE

City News and Novelty, Inc., operates an adult bookstore in the City of Waukesha, Wisconsin. In years past, City News and Novelty, Inc., has annually renewed its license to operate as an adult business under the

provisions of § 8.195, A-3-4,[1] of the Municipal Code of the City of Waukesha. Its most recent license was due to expire January 25, 1996. On November 15, 1995, City News and Novelty, Inc., applied for renewal of its license. On December 19, 1995, the Common Council of the City of Waukesha denied renewal of its license. A-7.

City News and Novelty, Inc., pursued administrative review of the Council's decision.[2] On January 22, 1996, the Common Council reviewed and affirmed its previous decision. A-72. The Waukesha Administrative Review Appeals Board ("Board") affirmed the City's denial of the license. A-81. City News and Novelty, Inc., sought judicial review via a statutory certiorari action in state court. There, City News and Novelty, Inc., argued that the action of the City in failing to renew its license was unlawful because the licensing ordinance was an unconstitutional prior restraint. In a decision filed April 2, 1997, the circuit court confirmed that City News and Novelty, Inc., had properly preserved its arguments concerning the facial invalidity of the ordinance for review, but rejected those arguments on the merits, and affirmed the decision of the Board. A-55. City News and Novelty, Inc., appealed.

---

[1] References to the Appendix to this Petition will be shown as A-___.

[2] Because an administrative body does not have the power to declare an ordinance or a statute unconstitutional, at this stage of the proceedings City News and Novelty, Inc., merely noted its constitutional objections, listing the specific constitutional infirmities alleged in order to preserve the constitutional issues for judicial review.

After receiving the briefs of both parties, the Court of Appeals certified the appeal to the Wisconsin Supreme Court. A-44. By order of April 21, 1998, the Wisconsin Supreme Court refused certification. A-53. The Court of Appeals issued its decision October 20, 1999, A-1. It found that one section of Waukesha's licensing ordinance, § 8.195(3)(b), which governs an applicant's right to a public hearing following denial of a license, was unconstitutional, but also found that provision severable. It upheld the remainder of the ordinance, and therefore, in significant part, affirmed the decisions of the trial court and of the Board.

The Wisconsin Court of Appeals held that although ordinarily when an ordinance regulates First Amendment activities, the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt, this Court, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-230 (1990), "rejected this approach where First Amendment prior restraints are concerned and the government action at issue is the review of an applicant's qualifications for a business operating license." A-10. Using this standard, the Court of Appeals found that City News and Novelty, Inc., had not met its burden to demonstrate that the ordinance either permitted unbridled discretion as to the granting and denying of licenses, or that it lacked the required procedural safeguards of prompt administrative and judicial review. City News and Novelty, Inc., filed a timely Petition for Review to the Wisconsin Supreme Court. By order dated January 18, 2000, the Wisconsin Supreme Court denied review. A-54.

REASONS FOR GRANTING THE WRIT

I. THE WISCONSIN COURT COMPROMISED AN IMPORTANT FIRST AMENDMENT SAFEGUARD WHEN IT INTERPRETED *FW/PBS, INC. V. CITY OF DALLAS* TO REQUIRE ONE WHO CHALLENGES A LICENSING SCHEME, WHICH ACTS AS A PRIOR RESTRAINT, TO BEAR THE BURDEN OF PROOF IN DEMONSTRATING THAT THE ORDINANCE VIOLATES THE FIRST AMENDMENT.

When the Wisconsin Court of Appeals broke with all First Amendment precedent and transferred the burden of persuasion to City News and Novelty, Inc., requiring it to prove beyond a reasonable doubt that Waukesha's licensing ordinance was an unconstitutional prior restraint, it did so because it believed its holding was required by *FW/PBS, Inc. v. City of Dallas*, 333 U.S. 215 (1990). This Court should issue its writ of certiorari to correct the misconception upon which this error is based. This Court should clarify that *FW/PBS* did not, in fact, alter the long-standing rule that where a party challenges a regulation that restricts the exercise of freedoms protected by the First Amendment, the government bears the burden of justifying the restrictions. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Freedman v. Maryland*, 380 U.S. 51 (1965).

A. It Is Unlikely that this Court Intended to Alter The Allocation of the Burden of Proof.

The language in *FW/PBS, Inc. v. City of Dallas*, 333 U.S. 215 (1990) cited by the Wisconsin Court of Appeals as the basis for its imposing upon the petitioner the burden of proving the ordinance to be unconstitutional is found in the portion of Justice O'Connor's plurality opinion where the Dallas licensing scheme is distinguished from the censorship system at issue in *Freedman v. Maryland*, 380 U.S. 51 (1965). The Wisconsin Court gave no indication that it knew it was relying on a non-majority opinion. A-10. That three-justice plurality opinion says:

> The licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman*. . . . The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in *Freedman*, where only one film was censored. Because the license is the key to the applicants obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court. Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a licensing application or that it bear the burden of proof once in court.

FW/PBS, 493 U.S. at 229.

The distinction which the plurality was discussing in this portion of its opinion was twofold: First, in general, the licensing authority does not pass judgment on the content of the protected expression, and second, the licensee has a much greater incentive to seek judicial

review in the face of an adverse ruling than did the individual film producer in *Freedman*. As to the latter point, it makes some sense to require the applicant seeking the license to initiate any court action. However, as to the former, it is one thing to require the applicant to bear the burden of proof on the issues of fact going to its own qualifications, but it is quite another to require that it bear the burden of proof or persuasion in regard to a facial challenge to the validity of the regulation itself.

The language used by Justice O'Connor in other sections of the same opinion belies any intent to shift from the government the burden of justifying the restriction on First Amendment freedoms. For example, an earlier portion of the same section of the opinion begins "while '[p]rior restraints are not unconstitutional per se . . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity.' " *Id.* at 225 (multiple citations omitted). To say that a system of prior restraint, including a scheme of licensing adult bookstores, bears a heavy presumption against its constitutional validity is another way of saying that it is the government that bears the burden of justifying the regulation. *See*, for example, *Clark v. Community for Creative Nonviolence*, 468 U.S. at 294, n.5, where this Court explained that the general rule that one who seeks relief bears the burden of demonstrating entitlement to it means that one who claims that a regulation impinges on activity protected by the First Amendment bears the burden of establishing that the activity is in fact protected by the First Amendment; once that is established, the government bears the burden of justifying its restrictions.

Lower courts have consistently interpreted the "presumption of unconstitutionality" as requiring the government to bear the burden of demonstrating the validity of a regulation that functions as a prior restraint. See, for example, *Jersey's All-American Sports Bar, Inc. v. Washington State Liquor Control Board*, 55 F. Supp. 2d 1131, 1138 (1999): "The government can only overcome this presumption by demonstrating that the prior restraint includes procedural safeguards designed to protect against abuse of the power to censor. . . . To avoid a finding that a statute grants unbridled discretion, the government must show that it includes narrow, objective, and definite standards for the granting or denial of the license," citing *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

Given the *FW/PBS* plurality's reiteration that the prior restraint there bore a heavy presumption of unconstitutionality, it is highly unlikely that the plurality intended to do away with such a presumption. More likely, it was the intention of the plurality to say that while the municipality retained the burden of justifying its restriction in the face of a facial challenge to the validity of the ordinance, the license applicant should assume the burden on any challenge to its qualifications to hold a license.

B. The Requirements of *Freedman* Are Still Binding Precedent.

The position that a licensing ordinance does not require all three *Freedman* safeguards was advanced by Justice O'Connor in § II of her plurality opinion in *FW/PBS*. Only Justices Stevens and Kennedy joined that section of the opinion. Three justices, Brennan, Marshall, and Blackmun, concurred in the judgment that the Dallas ordinance was unconstitutional but believed that none of the *Freedman* requirements may be eliminated in the context of a licensing regulation which restricts First Amendment freedoms. Those justices argued that the "transcendent value of speech" always requires that the burden of persuasion be placed on the government when expression is regulated. *FW/PBS*, 493 U.S. at 238, citing *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). Chief Justice Rehnquist and Justice White, concurring and dissenting, would not have applied any *Freedman* safeguards to a licensing situation, and Justice Scalia, dissenting, would have applied a different analysis entirely.

When a "fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[t] on the narrowest grounds." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764, n.9 (1988), citing *Marks v. United States*, 430 U.S. 188, 193 (1977). Therefore, *FW/PBS* may not properly be read as requiring that the safeguards set forth in *Freedman* have been modified, since that rationale neither enjoyed the assent of the majority nor was the narrowest ground for the decision.

There was a single rationale, though, enjoying the assent of six Justices, that completely explains the result in *FW/PBS*. Six Justices agreed that the Dallas ordinance was unconstitutional because it was a prior restraint requiring at least two of the three *Freedman* procedural

safeguards, and those two safeguards were lacking. *11126 Baltimore Boulevard v. Prince George's County, Maryland*, 58 F.3d 988, 999, n.15 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1010. In short, the requirements established by this Court in *Freedman* have not been modified and are therefore still binding on the states.

The fact that this court has been unable to muster a majority opinion in some First Amendment cases concededly makes life more challenging for lower court judges. Each Justice of this court no doubt tries hard to move toward consensus, at least to the point of enabling the court to issue a majority opinion, before reluctantly accepting the fact that conscience requires a separate statement. This court has also instructed the lower courts, in *Marks*, *City of Lakewood*, and elsewhere, on how to determine the authoritative holdings of such cases.

For a court whose decisions become the law of a state to disregard these instructions and simply treat a plurality opinion as if it were a majority holding, just because it appears first in the reporters, is a serious matter. It not only begets error in the case at hand, but it sends a message to trial-level courts and lawyers that they may simply dispense with the arduous vote counting required by a *Marks* analysis, and treat a lead plurality opinion as if it were a majority opinion. This court should grant certiorari in this case to nip this practice in the bud, in recognition of the value of the sincere exercise of conscience that sometimes compels a Justice of this court to write separately, even where this choice means the court will not produce a majority opinion, and lawyers and judges will have to read carefully and count votes.

II. WAUKESHA'S LICENSING ORDINANCE DOES NOT CONTAIN EXPLICIT, OBJECTIVE STANDARDS TO PREVENT THE EXERCISE OF UNLAWFUL DISCRETION.

A licensing scheme which acts as a prior restraint must exhibit not only the three *Freedman* procedural safeguards, but it must also contain "narrow, objective and definite standards to guide the licensing authority" in deciding who gets licenses and who does not get them. *Shuttlesworth v. Birmingham*, 394 U. S. 147, 150-151 (1969). "It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Id.*, at 151 (quoting *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958)).

In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759-760 (1988), this court recognized that discretion in the granting or denying of required periodic license renewals can be every bit as effective a cloak for the censorship of unpopular speech as discretion in the granting or denying of new licenses.

Some licensing schemes empower licensing authorities to respond to violations of their lawful regulations by imposing temporary prohibitions on licensees' rights to engage in the licensed expressive activity. It is self-evident that standardless discretion as to the duration of such a temporary prohibition can be every bit as much a

cloak for censorship as standardless discretion in the granting or denying of new licenses or annual renewals. A licensing authority might respond to unpopular speech by imposing a long suspension or even a permanent revocation for a trivial violation. An ordinance which permits a licensing authority to censor by back-door suspensions without standards to govern the severity of the penalties it imposes is necessarily every bit as facially objectionable as one which permits front-door censorship in the granting or denying of a license in the first place.

A. Provisions which Allow the City to Choose Between Mild and Severe Punishments Without Standards to Guide that Choice Confer Unbridled Discretion Upon City Officials.

Under Waukesha's ordinance, if an operator commits a violation, the ordinance gives the city unbridled discretion to determine whether such a violation will be punished by a revocation, which lasts for a maximum of one year, or by nonrenewal of a subsequent license, which lasts for five years. A-36. The ordinance lists no criteria by which the city is governed in making this choice. A-104-106. Before the Wisconsin courts, the city defended the absolute discretion its scheme vests in city officials as to severity of punishment for violations. A-35.

Without standards to prevent subjective criteria from being used as the basis for deciding which penalty to invoke, the ordinance does not protect a bookstore from being subject to the danger of censorship. Nothing in the

language of the ordinance prevents the city from choosing the most severe penalty because of its distaste for the materials disseminated. Because such a decision would not only be unconstitutional, but also virtually undetectable, *see, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988), it is necessary that the ordinance contain explicit provisions which would make such an occurrence impossible. The *Lakewood* Court cautioned that demonstrating the link between the expressive content and the subsequent denial of license renewal might well prove impossible. *Id.* at 759-760. Thus, the dangers inherent in the Waukesha ordinance, which contains no explicit standards and permits subjective discretion to be exercised in determining what penalty to apply after a violation has occurred are exacerbated in circumstances where, as here, a store selling unpopular expressive material must seek renewal on an annual basis.

This court should grant certiorari to make it clear to government entities that standardless discretion at any phase of a licensing scheme where the right to speak is in play violates the First Amendment.

III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER THE GUARANTEE OF PROMPT JUDICIAL REVIEW THAT MUST ACCOMPANY A LICENSING SCHEME MEANS A PROMPT JUDICIAL DETERMINATION OR SIMPLY THE RIGHT TO PROMPTLY FILE FOR JUDICIAL REVIEW.

The Waukesha licensing ordinance comes up short of constitutionally mandated procedural safeguards in

another way. Another element which this Court has found essential in an ordinance which restricts freedom of expression by licensing it is "prompt judicial review in the event that the license is erroneously denied." *FW/PBS*, 493 U.S. at 228 (O'Connor, J., plurality opinion). As the Wisconsin Court of Appeals noted in its decision, there is currently a split among the federal appellate circuit courts as to whether "prompt judicial review" means merely speedy access to, or initiation of, judicial review, or alternatively, whether it means a prompt judicial decision. A-21-22. The Court of Appeals went on to resolve this issue by holding that "prompt judicial review" means prompt access to court. A-22. This court should grant the requested writ in order to resolve this serious conflict among the circuits.

A. The Court Should Grant Certiorari to Consider the Role that Preserving the Status Quo May Play When A Municipality Lacks the Power to Require a State Court to Determine a License Case Promptly.

One reason the Wisconsin court was reluctant to hold that prompt judicial review means a prompt judicial decision was that it was dealing with a local ordinance, and the Waukesha City council lacks the authority to impose time requirements on Wisconsin's state courts. A-22. What Waukesha can do, though, is to guarantee that the status quo will be maintained throughout the pendency of judicial review proceedings. In the case of an existing business, like the Petitioner here, such a provision would in most cases keep the business from suffering any injury from an adverse licensing decision until such time as the

courts finally determine the matter. The purpose behind the requirement of prompt judicial review would be served, even though the ordinance could only afford prompt access to court. *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) ("if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.").

In the instant case, the City of Waukesha *ad hoc* permitted City News to continue operating without interruption throughout much of the judicial review process. However, every bookstore is entitled to *explicit* protection in this regard, and need not simply rely on the charity or kindness of city officials. In reiterating the "essential" safeguards, this Court has required "the licensor to make the decision whether to issue the license within a specified and reasonable period of time during which the status quo is maintained." *FW/PBS*, 493 U.S. at 228 (O'Connor, J., plurality opinion). Even the Fifth Circuit Court of Appeals, one of the circuits which has taken a narrow approach to the issue of prompt judicial review, agrees on the need to preserve the status quo by explicit language:

> The contention is that the County cannot constitutionally shut down an existing business while its application for a license is pending, and that TK's was operating when Denton County adopted its regulations. The County points out that it has not attempted to close TK's. . . .
>
> Maintaining the status quo means in our view that the County cannot regulate an existing business during the licensing process. It is no answer that the County has not elected to do so.

> The absence of constraint internal to the regulation is no more than open-ended licensing. Businesses engaged in activity protected by the First Amendment are entitled to more than the grace of the state. . . .
>
> Because TK's was in business when the Order was adopted, its free speech activity cannot be suppressed pending review of its license application by the County.

TK's Video v. Denton County, 24 F.3d 705, 708 (5th Cir. 1994).

The court in *Wolff v. City of Monticello*, 803 F. Supp. 1568, 1574 (D. Minn. 1992) also held that even if the city has not attempted to force an applicant out of business during the pendency of proceedings, the retention of the status quo must be *explicit* in the ordinance itself. *Wolff*, 803 F. Supp. at 1574-75. The Fourth Circuit, too, has held that not only must the status quo be explicitly preserved throughout the administrative stage, but that it is preferable to extend it through the judicial review stage. *Chesapeake B&M, Inc. v. Harford County, Maryland*, 58 F.3d 1005, 1009 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1010 (1995); *Baltimore Blvd.*, 58 F.3d at 1001. And the Eleventh Circuit reminds us that the requirement that the status quo be maintained through at least the administrative process is one of the basic requirements which stems from *Freedman*. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1363 (11th Cir. 1999).

The Waukesha ordinance not only fails to explicitly provide for the retention of the status quo; in fact, on its face, it says the opposite, at § 8.195(2)(b), A-101, which

states, "[N]o adult establishment shall be operated . . . without first obtaining a license to operate." When the lack of preservation of the status quo is coupled with the lack of definitive time limits and the attendant possible delay in judicial review, the Waukesha ordinance has the potential for long-term suppression of expression prior to any type of judicial review. As a result, it is constitutionally defective on its face. This court should grant certiorari to assist those government entities that wish to regulate adult businesses within the constitutional boundaries of their power to do so, by more clearly defining those boundaries in this notoriously murky area, and in particular, by more clearly stating the meaning of "prompt judicial review" and illuminating the interplay between the concept of prompt judicial review and retention of the status quo during administrative and judicial proceedings in license cases.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be, in all respects, granted.

Dated this 17th day of April, 2000.

Respectfully submitted,

CITY NEWS AND NOVELTY, INC.

Petitioner

By

THE JEFF SCOTT OLSON LAW FIRM, S.C.
JEFF SCOTT OLSON
131 W. Wilson St., Suite 1200
Madison, WI 53703
(608) 283-6001

Attorney for Petitioner

TABLE OF CONTENTS APPENDIX

DOCUMENT — PAGE

Decision of Wisconsin Court of Appeals, October 20, 1999 ..... A-1

Certification by Wisconsin Court of Appeals, March 18, 1998 ..... A-44

Order of Wisconsin Supreme Court Refusing Certification, April 21, 1998 ..... A-53

Order of Wisconsin Supreme Court Denying Petition For Review, January 18, 2000 ..... A-54

Decision of Circuit Court for Waukesha County, April 2, 1997 ..... A-55

City of Waukesha Administrative Review Appeals Board Findings, Conclusions and Decision, June 28, 1996 ..... A-72

City of Waukesha Common Council Resolution Denying Renewal of License, December 19, 1995 .. A-82

Chapter 68, Wis. Stats. A-85

Section 8.195, City of Waukesha, Wis., Municipal Code (1995) A-95

COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1504

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

CITY NEWS & NOVELTY, INC.,

PLAINTIFF-APPELLANT,

v.

CITY OF WAUKESHA,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed in part and reversed in part.*

Before Nettesheim, Anderson and Snyder, JJ.

¶ 1 SNYDER, J. City News and Novelty, Inc. (City News) appeals from a circuit court judgment affirming the City of Waukesha's (the City) decision not to renew City News's license to operate an adult-oriented establishment. City News raises the following issues on appeal. First, it contends that the City's adult establishment licensing scheme is unconstitutional because it fails to offer explicit standards for license renewal, provides inadequate time limits for judicial review, fails to preserve the status quo throughout the administrative process and does not permit prompt judicial review. Second, City News raises due process arguments claiming that it was deprived of an impartial administrative review, that it was given inadequate notice of the allegations against it and that the City improperly invoked the most severe sanction of nonrenewal. Finally, it contends that the grounds for nonrenewal were insufficient as a matter of law.[1]

¶ 2 While we find City News's arguments unavailing in large part, we conclude that § 8.195(3)(d) of the CITY OF WAUKESHA, WIS., MUNICIPAL CODE (1995) (hereinafter MUNICIPAL CODE), providing an applicant the right to a public hearing, is constitutionally infirm. However, because the public hearing provision of § 8.195(3)(d) is severable from the remainder of the ordinance, we reverse as to this provision and affirm as to the remainder.

---

[1] We certified the issues of preservation of the status quo, prompt judicial review and imposition of the most severe municipal sanction to the supreme court. *See* RULE 809.61, STATS. The supreme court, however, declined to take the case.

BACKGROUND

¶ 3 City News is an adult-oriented establishment in the city of Waukesha which sells, rents and otherwise makes available to its customers sexually explicit books, magazines, videotapes and other materials. It also provides viewing booths in which its customers may view videotapes.

¶ 4 City News is licensed annually under the provisions of § 8.195 of the MUNICIPAL CODE.[2] Licensure is

---

[2] The pertinent provisions of CITY OF WAUKESHA, WIS., MUNICIPAL CODE § 8.195 (1995), include the following:

> (2) LICENSE. (a) [N]o adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City.
>
> . . . .
>
> (3) APPLICATION FOR LICENSE. (a) Any person desiring to secure a license shall make application to the City Clerk. . . .
>
> . . . .
>
> (c) Within 21 days of receiving an application for a license, the City Clerk shall notify the applicant whether the application is granted or denied.
>
> (d) Whenever an application is denied, the City Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter before the Council or its designated committee as hereinafter provided.
>
> . . . .

required for an individual or a corporation to operate or maintain an adult-oriented establishment. *See id.* § 8.195(2)(a). An application to renew a license must be filed no later than sixty days before the license expires.

---

(4) STANDARDS FOR ISSUANCE OF LICENSE. To receive a license to operate an adult oriented establishment, an applicant must meet the following standards:

. . . .

(b) If the applicant is a corporation:

1. All officers, directors, and stockholders required to be named under par. (3)(b) shall be at least 18 years of age.

2. No officer, director, or stockholder required to be named under par. (3)(b) shall have been found to have previously violated this section 5 years immediately preceding the date of the application.

. . . .

(7) RENEWAL OF LICENSE OR PERMIT. (a) Every license issued pursuant to this section will terminate at the expiration of one year from date of issuance, unless sooner revoked and must be renewed before operation is allowed in the following year. Any operator desiring to renew a license shall make application to the City Clerk. The application for renewal must be filed not later than 60 days before the license expires. The application for renewal shall be upon a form provided by the City Clerk and shall contain such information and data given under oath or affirmation as is required for an application for a new license.

. . . .

(c) If the City Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the City Clerk.

(d) The building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance.

. . . .

(9) PHYSICAL LAYOUT OF ADULT ORIENTED ESTABLISHMENT. Any adult oriented establishment having available for customers, patrons or members, any booth, room or cubicle for the private viewing of any adult entertainment must comply with the following requirements:

(a) *Access.* Each booth, room or cubicle shall be totally accessible to and from aisles and public areas of the adult oriented establishment and shall be unobstructed by any door, lock or other control-type devices.

(b) *Construction.* Every booth, room or cubicle shall meet the following construction requirements:

1. Each booth, room or cubicle shall be separated from adjacent booths, rooms or cubicles and any non-public areas by a wall.

2. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same.

. . . .

(c) *Occupants.* Only one individual shall occupy a booth, room or cubicle at any time. No occupants of same shall engage in any type of sexual activity, cause any bodily discharge or litter while in the booth. No individual shall damage or deface any portion of the booth.

See id. § 8.195(7). The city clerk shall notify the applicant whether the application is granted or denied within

---

(d) *Inspections.* The Building Inspector shall conduct monthly inspections of the premises to insure compliance with the provisions of this subsection.

(10) RESPONSIBILITIES OF THE OPERATOR. (a) Every act or omission by an employee constituting a violation of the provisions of this Section shall be deemed the act or omission of the operator if such act or omission occurs either with the authorization, knowledge, or approval of the operator, or as a result of the operator's negligent failure to supervise the employee's conduct, and the operator shall be punishable for such act or omission in the same manner as if the operator committed the act or caused the omission.

(b) Any act or omission of any employee constituting a violation of the provisions of this section shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed.

(c) No employee of an adult oriented establishment shall allow any minor to loiter around or to frequent an adult oriented establishment or to allow any minor to view adult entertainment as defined herein.

. . . .

(f) The operator shall insure compliance of the establishment and its patrons with the provisions of this section.

(11) ADMINISTRATIVE REVIEW PROCEDURE. The City ordinances and State law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

twenty-one days of the application's receipt. *See id.* § 8.195(3)(c).

¶ 5 For a corporate applicant, the licensure standards state that no officer, director or stockholder "shall have been found to have previously violated this section 5 years immediately preceding the date of the application." *Id.* § 8.195(4)(b)2. The ordinance then sets forth specific requirements for the physical layout and the conduct of patrons and employees of the establishment which, among other things, provide that: (1) every viewing booth or room must have at least one side entirely open to the public,[3] (2) no patron may engage in any type of sexual activity, and (3) no employee may permit a minor to loiter around or patronize the establishment. *See id.* § 8.195(9)(b)2, (9)(c), (10)(c).

¶ 6 On November 15, 1995, City News applied for renewal of its license which was due to expire on January 25, 1996. On December 19, 1995, the common council passed a resolution finding that City News had committed several code violations and therefore denied its renewal application. The violations included permitting minors to loiter on the premises, failing to maintain an unobstructed view of the viewing booths and allowing patrons to engage in sexual conduct inside the booths.

¶ 7 After City News requested review of the resolution, the common council affirmed the decision. City

---

[3] City News has previously challenged the City's open booth policy. In *See City News & Novelty, Inc. v. City of Waukesha,* 170 Wis.2d 14, 23, 487 N.W.2d 316, 319 (Ct. App. 1992).

News sought administrative review, and on June 28, 1996, the City of Waukesha Administrative Review Appeals Board affirmed the common council's decision. City News then filed a certiorari action in the circuit court seeking judicial review of the denial of its license renewal application. In an April 2, 1997 decision, the circuit court affirmed the board's determination. City News appeals.[4]

STANDARD OF REVIEW

¶ 8 In an action for certiorari review, appellate review is the same as in the trial court. *See* ***State ex rel. Wilson v. Schocker,*** 142 Wis.2d 179, 183, 418 N.W.2d 8, 9 (Ct. App. 1987). We confine our review to whether: (1) the board kept within its jurisdiction; (2) the board acted according to the law; (3) the action was arbitrary, oppressive or unreasonable; and (4) the evidence presented was such that the board might reasonably make the order or determination in question. *See* ***State v. Goulette,*** 65 Wis.2d 207, 215, 222 N.W.2d 622, 626 (1974). The primary issues raised in this case involve constitutional questions

[4] We note that in ***Suburban Video, Inc. v. City of Delafield,*** 694 F. Supp. 585 (E.D. Wis. 1988), the District Court for the Eastern District of Wisconsin addressed the constitutionality of a licensing scheme identical in relevant part to the City of Waukesha's. There, the court found the City of Delafield's ordinance constitutional except for a provision requiring disclosure of an applicant's detailed personal information. *See id.* at 592. While the court did not specifically address the issues raised here, we nevertheless remark that the licensing scheme was upheld as being narrowly tailored and furthering a substantial governmental purpose. *See id.* at 589 (citing ***City of Renton v. Playtime Theatres, Inc.,*** 475 U.S. 41 (1986)).

and questions of statutory construction which are questions of law that we review de novo. *See* ***City of Waukesha v. Town Bd.,*** 198 Wis.2d 592, 601, 543 N.W.2d 515, 518 (Ct. App. 1995); ***State v. Migliorino,*** 150 Wis.2d 513, 524, 442 N.W.2d 36, 41 (1989).

DISCUSSION

A. First Amendment Protections

¶ 9 City News raises a number of facial challenges to the constitutionality of the City's licensing scheme. "Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad." ***FW/PBS, Inc. v. City of Dallas,*** 493 U.S. 215, 223 (1990).

¶ 10 ***FW/PBS*** is the United States Supreme Court's most recent articulation of the constitutional principles that apply to municipal licensing schemes implicating First Amendment rights. The Court held that a licensing scheme that exists as a prior restraint on businesses purveying sexually explicit but protected speech is constitutionally permissible if it contains safeguards to minimize the possibility that the licensing procedure will be used to suppress speech. *See* **id.** at 226. The Court then set forth several requirements that licensing ordinances must follow to pass constitutional scrutiny. First, the regulatory scheme cannot place "unbridled discretion in the hands of a government official or agency." ***Id.*** at 225 (quoting ***City of Lakewood v. Plain Dealer Publ'g Co.,*** 486 U.S. 750, 757 (1988)). In other words, if a permit or license may

be granted or withheld solely at the discretion of a government official, this is an "unconstitutional censorship or prior restraint" upon the exercise of the freedom of speech. *See id.* at 226. Second, "a prior restraint that fails to place limits on the time within which the decision-maker must issue the license is impermissible." *Id.* A licensing decision must be made "within a specified and reasonable time period during which the status quo is maintained." *Id.* at 228. Finally, a regulatory scheme must provide for "prompt judicial review" in the event that a license is erroneously denied. *See id.*

¶ 11 We apply the constitutional framework in ***FW/PBS*** to our examination of the City's licensing scheme. In doing so, we note that although ordinances normally receive a presumption of constitutionality which the challenger must refute, when the ordinance regulates First Amendment activities "the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt." ***County of Kenosha v. C & S Management, Inc.***, 223 Wis.2d 373, 383, 588 N.W.2d 236, 242 (1999). Wisconsin courts have routinely applied this burden-shifting approach in First Amendment cases. *See, e.g., id.; **Lounge Management, Ltd. v. Town of Trenton,*** 219 Wis.2d 13, 20, 580 N.W.2d 156, 159 (1998); ***Town of Wayne v. Bishop,*** 210 Wis.2d 218, 231, 565 N.W.2d 201, 206 (Ct. App. 1997). ***FW/PBS***, however, rejected this approach where First Amendment prior restraints are concerned and the government action at issue is the review of an applicant's qualifications for a business operating license. The ***FW/PBS*** Court explained its reasoning in the following passage, distinguishing its licensing scheme from the scheme in ***Freedman v. Maryland,*** 380 U.S. 51 (1965).

> The Court . . . required in *Freedman* that the censor bear the burden of going to court in order to suppress the speech and the burden of proof once in court. The licensing scheme we examine today is significantly different from the censorship scheme examined in ***Freedman***. In ***Freedman,*** the censor engaged in direct censorship of particular expressive material. Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in ***Freedman*** was required to carry the burden of going to court if the speech was to be suppressed and of justifying its decision once in court. Under the Dallas ordinance [in ***FW/PBS***], the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid. The Court in ***Freedman*** also placed the burdens on the censor, because otherwise the motion picture distributor was likely to be deterred from challenging the decision to suppress the speech and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech. The license applicants under the Dallas scheme have much more at stake than did the motion picture distributor considered in ***Freedman***, where only one film was censored. Because the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court. *Because of these differences, we conclude that the First Amendment does not require that the city bear the burden of going to court to effect the denial of a*

> *license application or that it bear the burden of proof once in court.*

FW/PBS, 493 U.S. at 229-30 (emphasis added). The licensing ordinance at play here is the same type that was before the Court in ***FW/PBS***. Both involve the ministerial act of assessing license applications; however, neither engages in direct censorship or entails the "exercise [of] discretion by passing judgment on the content of any protected speech." ***Id.*** at 229. Consequently, we conclude that the burden does not shift to the City to defend the ordinance's constitutionality.

1. Renewal Standards

¶ 12 City News first contends that the ordinance is unconstitutional because it fails to provide explicit standards for license renewal. This argument goes to the issue of whether the ordinance permits "unbridled discretion." Because we conclude that the ordinance contains specific guidelines for renewal, we reject City News's argument.

¶ 13 Our review begins with subsec. (7) of the ordinance, entitled "RENEWAL OF LICENSE OR PERMIT," which contains several guidelines for renewal. *See* MUNICIPAL CODE § 8.195(7). Every license terminates after one year and must be renewed before operation is permitted for the following year. *See id.* § 8.195(7)(a). The applicant for renewal must provide a $250 renewal fee, the building must be inspected prior to renewing the license and the City of Waukesha Police Department must file with the city clerk any information it finds bearing on the operator's qualifications. *See id.* § 8.195(7)(b), (c), (d). The application "shall contain such information and data

given under oath or affirmation as is required for an application for a new license." *Id.* § 8.195(7)(a). City News contends that because the subsec. (7) standards fall under the "RENEWAL" heading, these are the only guidelines that apply for renewal and that the standards found under subsec. (4), entitled "STANDARDS FOR ISSUANCE OF LICENSE," only apply to the issuance of *new* licenses. We disagree.

¶ 14 At first blush, the ordinance appears to contain discrete subsections on issuance, revocation and renewal of licenses because each of these procedures has a separate heading. However, when read as a whole, it is clear that the standards of issuance are also meant to apply to renewal. Following the subsection on renewal are provisions addressing all matters of licensing. In particular, para. (10)(b) of the subsection entitled "RESPONSIBILITIES OF THE OPERATOR" states that

> [a]ny act or omission of any employee constituting a violation of the provisions of this section shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or *renewed*. [Emphasis added.]

Paragraph (10)(f) also provides that "[t]he operator shall insure compliance of the establishment and its patrons with *the provisions of this section*." (Emphasis added.) The phrase "the provisions of this section" comprises *all* regulations within the licensing scheme, whether falling under renewal subsec. (7) or not. As outlined earlier, the ordinance's guidelines under subsecs. (9) and (10) address the proper physical layout of the premises and the conduct of the operators, employees and patrons. City

News does not dispute the adequacy of these guidelines, and we are satisfied that they provide "narrow, objective, and definite standards to guide the licensing authority." ***Shuttlesworth v. City of Birmingham,*** 394 U.S. 147, 151 (1969). We therefore reject City News's argument that the scheme gives the City unfettered discretion to issue licenses.

¶ 15 Apart from the renewal standards, City News asserts that the ordinance is defective because it does not expressly state that a new license *must* be issued upon satisfaction of the new license standards. City News cites ***Wolff v. City of Monticello,*** 803 F.Supp. 1568 (D. Minn. 1992), for the proposition that a licensing scheme must direct the granting of a license when an applicant is not rendered ineligible under its standards.

¶ 16 In ***Wolff,*** the court reviewed a licensing ordinance for an adult-oriented establishment that instructed the city council to investigate each application and hold a public hearing. Following the hearing, the council had the unconditional power to "grant or refuse the application." ***Id.*** at 1573. The court determined that because the ordinance only provided guidelines as to which persons and places were *ineligible* for a license, there were no criteria establishing which persons and places were *eligible*. *See* ***id.*** at 1574. The court faulted this scheme because

> there [was] no provision in the ordinance requiring the city council to grant license applications for any person or place that is not rendered ineligible under [the ordinance]. Limits on discretion in licensing schemes must "be made explicit by textual incorporation, binding judicial or administrative construction, or well-

> established practice." Thus, the city may neither rely on claims of implied limits nor ask the Court to write limits into a silent regulation.

Id. (quoting ***City of Lakewood,*** 486 U.S. at 770).

¶ 17 Unlike ***Wolff,*** the ordinance here has clear-cut standards for licensing. The applicant must not have violated any provision in the ordinance, including requirements pertaining to the physical layout of the establishment, the conduct of the patrons and the responsibilities of the employees and operator. While the ordinance does not contain a statement specifically requiring the granting of a license when the applicant is not rendered ineligible, the common council is not free to grant or deny applications at its whim. The ordinance's standards are plainly spelled out and are not contingent upon the type of "silent regulation" at play in ***Wolff***. *See* ***id.***

¶ 18 City News's reliance on ***City of Lakewood*** is also misplaced. There, the Supreme Court ruled unconstitutional a licensing ordinance that gave the mayor unbounded discretion to grant or deny applications and which merely required an explanation of the reasons for denial without the use of standards. *See* ***City of Lakewood,*** 486 U.S. at 769-72. ***City of Lakewood*** carries no weight here because the City's licensing scheme does set forth specific guidelines and expressly provides that a violation of such guidelines constitutes a ground for nonissuance or nonrenewal.

¶ 19 City News further contends that the ordinance is unconstitutionally vague and permits unbridled discretion because there are no rules defining the level of proof

of findings under MUNICIPAL CODE § 8.195(4)(b)2, the provision barring licensure in the event an applicant is "found" to have previously violated the ordinance. City News claims that the ordinance must establish whether the finding is to be a mere accusation, a municipal citation, a conviction in municipal court or a conviction in a court of record.

¶ 20 While the criteria for the common council's findings are clearly circumscribed by the ordinance, we agree that the scheme does not set forth levels of proof for the council's findings. However, City News cites no authority, and we can find none, that requires such direction. As the City points out, the common council is given the power "to act for the government . . . and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation . . . and other necessary or convenient means." Section 62.11(5), STATS. Within the council's power is the authority to make its own findings. While licensing ordinances must include narrow and detailed standards, City News presents no case law indicating that such standards extend to the level of proof of the municipality's findings. We therefore conclude that City News has failed to rebut the presumption of the ordinance's constitutionality on this issue.

2. *Inadequate Time Limits*

¶ 21 City News contends that the City's licensing scheme is defective because it does not prescribe mandatory time limits for the application process. We disagree.

¶ 22 The City's licensing ordinance requires that a license renewal application be filed at least sixty days before the license is due to expire. See MUNICIPAL CODE § 8.195(7)(a). Within twenty-one days of the application's receipt, the City "shall notify the applicant whether the application is granted or denied."[5] *Id.* § 8.195(3)(c). As part of the renewal process, "[i]f the City Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the City Clerk." *Id.* § 8.195(7)(c). In addition, "[t]he building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance." *Id.* § 8.195(7)(d).

¶ 23 Despite the time sequence set forth above, City News contends that the filing of police information and the building inspection render the City's licensing scheme constitutionally defective because these conditions permit a delay in the application process beyond the prescribed time limits. While we agree that a licensing condition must place time limits on the issuance of the license, *see* ***FW/PBS***, 493 U.S. at 226, we are not persuaded that the ordinance fails here.

¶ 24 In ***FW/PBS***, the City of Dallas enacted a licensing scheme for sexually-oriented businesses giving the city police chief thirty days to accept a license application. *See id.* at 227. Issuance of the license was contingent

---

[5] Although City News points out that the City did not give notice of its denial until thirty-five days after receipt of the application, this fact has no bearing on a facial challenge to the ordinance.

upon a building inspection for which there was no mandated time period. *See id.* Because there was no time limitation on the inspection and because the ordinance provided no means for an applicant to ensure inspection within the thirty-day application period, the Court concluded that the scheme was unconstitutional. *See id.*

¶ 25 In contrast to ***FW/PBS***, the building inspection and filing of police information here do not create a means for delaying the City's twenty-one day licensure period. First, while a building inspection is required, the ordinance provides that the inspection must occur "prior to the renewal of [the] license." MUNICIPAL CODE § 8.195(7)(d). The onus is on the building inspector to complete his or her inspection before the license is to be renewed. This provision does not compare to ***FW/PBS*** because the ordinance there simply stated that a license will not be issued if the premises "have not been approved by the health department, fire department, and the building official." ***FW/PBS***, 493 U.S. at 227.

¶ 26 Second, MUNICIPAL CODE § 8.195(7)(c) provides that the filing of police information is to occur only if the police are "aware of any information bearing on the operator's qualifications." Unlike the building inspection, the filing of police information is not compulsory. This provision, therefore, does not stand in the way of the twenty-one day approval deadline because the submission of information is solely at the discretion of the police department. We conclude, therefore, that the City's ordinance does not permit delays in the twenty-one day application period.

3. Preserving the Status Quo

¶ 27 City News contends that the ordinance is defective because it fails to explicitly require preservation of the status quo pending judicial review of a license denial or revocation. We conclude that while the ordinance does not contain a status quo provision, such language is unnecessary. What is important is that the status quo is maintained by the operation of the licensing scheme. The ordinance here does just that.

¶ 28 ***FW/PBS*** instructs that "the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained." ***FW/PBS***, 493 U.S. at 228. As illustrated above, the licensing scheme in this case starts with a license renewal application deadline sixty days before the license's expiration date. Upon receipt of the application, the City then has twenty-one days to inform the applicant whether the application is accepted or denied. Through these provisions, a decision must be rendered at the very least thirty-nine days before the license is due to lapse. As the City points out, because the common council's review of an application is completed prior to expiration of the license, the status quo is automatically maintained. Therefore, because we do not read ***FW/PBS*** as requiring anything more than the effective preservation of the status quo during the period in which the licensor makes its decision, we conclude that the ordinance satisfies the constitutional safeguards.

4. *Prompt Judicial Review*

¶ 29 City News next asserts that the ordinance does not guarantee "prompt judicial review," as established by the Supreme Court in ***Freedman***. The ***Freedman*** Court held that a licensing scheme must "assure a *prompt final judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." ***Id.*** at 59 (emphasis added). "Any restraint imposed in advance of a *final judicial determination on the merits* must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." ***Id.*** (emphasis added).

¶ 30 While the ***Freedman*** Court apparently contemplated timely issuance of a final "decision" or "determination," more recently in ***FW/PBS*** the Court appears to have relaxed this requirement by emphasizing the "possibility" and "availability" of prompt judicial review. Justice O'Connor[6] wrote that "expeditious judicial review of that decision must be *available*" and that "there must be the *possibility* of prompt judicial review in the event that the license is erroneously denied." ***FW/PBS***, 493 U.S. at 227, 228 (emphasis added). In his concurrence to ***FW/PBS***, Justice Brennan, the author of the *Freedman* opinion, also

[6] Although the Court in ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215 (1990), was split (three-way) as to which, if any, of the ***Freedman*** procedural safeguards applied, a majority of the justices agreed that (1) the licensor should make its decision within a specified and reasonable time period during which the status quo is maintained and (2) a licensing scheme must guarantee prompt judicial review. *See* ***FW/PBS***, 493 U.S. at 227, 239.

stated that "a prompt judicial determination must be *available*." ***FW/PBS***, 493 U.S. at 239 (emphasis added). While we note this change in the Court's language, we also acknowledge that the Court has yet to squarely define the parameters of "prompt judicial review."

¶ 31 Since ***FW/PBS***, federal courts of appeal have been divided on the issue of "prompt judicial review." The Fourth, Sixth and Ninth Circuits hold the view that "prompt judicial review" means a timely judicial determination on the merits. *See* ***Baby Tam & Co. v. City of Las Vegas***, 154 F.3d 1097, 1101-02 (9th Cir. 1998); ***11126 Baltimore Blvd., Inc. v. Prince George's County***, 58 F.3d 988, 998-1001 (4th Cir. 1995) (en banc); ***East Brooks Books, Inc. v. City of Memphis***, 48 F.3d 220, 225 (6th Cir. 1995).[7] These courts have reasoned that because a person always has a judicial forum available when his or her speech is allegedly encroached, "to hold that mere access to judicial review fulfills [***Freedman's*** prompt review requirement] makes the safeguard itself meaningless." ***Baby Tam***, 154 F.3d at 1101.

¶ 32 In the First, Fifth and Seventh Circuits, the courts have taken the alternative approach that prompt *access* to judicial review qualifies as "prompt judicial review." *See* ***TK's Video, Inc. v. Denton County***, 24 F.3d 705, 709 (5th Cir. 1994); ***Graff v. City of Chicago***, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc); ***Jews for Jesus, Inc.***

[7] Like the Fourth, Sixth and Ninth Circuits, the Eleventh Circuit has rejected the view that mere access to judicial review is sufficient, but it has not stated what more is required to satisfy the "prompt judicial review" standard. *See* ***Redner v. Dean***, 29 F.3d 1495, 1501-02 (11th Cir. 1994).

v. Massachusetts Bay Transp. Auth., 984 F.2d 1319, 1327 (1st Cir. 1993). In *Graff*, the court concluded that a newsstand ordinance that did not specifically mention judicial review was nonetheless constitutional because access to judicial review was afforded by means of the common law writ of certiorari. *See Graff*, 9 F.3d at 1324-25.

¶ 33 Because we believe that a municipality does not have the authority to direct a state judicial court to issue a decision within a specified period of time, we are inclined to follow the reasoning in *Graff* and the precise language of *FW/PBS* that prompt access or availability of judicial review satisfies First Amendment protections. *See FW/PBS*, 493 U.S. at 227. As the court explained in *TK's Video*, 24 F.3d at 709, "the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. A 'brief period' within which all judicial avenues are exhausted would be an oxymoron." While a local governing body can pass an ordinance directing judicial review within a short period of time, we doubt that it can also require a court to make a complete and final judicial review on the merits within a specified time period. We therefore conclude that the City's ordinance will be upheld as long as expeditious judicial review is available.

¶ 34 Here, the licensing scheme satisfies the prompt judicial review standard. MUNICIPAL CODE § 2.11(1) provides that administrative review of a municipality's determination is to be addressed by ch. 68, STATS.:[8]

[8] CITY OF WAUKESHA, WIS., MUNICIPAL CODE § 8.195(11) (1995) also states that state law governs the administrative procedure and judicial review of a license renewal case.

> To insure fair play and due process in the administration of the affairs, ordinances, resolutions and bylaws of the City, the Council hereby declares that the provisions of Ch. 68, Wis. Stats., relating to municipal administrative review procedure shall be in full force and effect in the City. . . .

Under ch. 68, an aggrieved party has thirty days in which to seek review of an initial determination before the municipal authority making the determination. *See* § 68.08, STATS The municipal authority then has fifteen days to conduct its review. *See* § 68.09(3), STATS Once the municipality issues its decision, the person aggrieved may then appeal; the appeal is taken within thirty days of the issuance of the decision. *See* § 68.10(1), (2), STATS The municipality must provide a hearing to the appellant within fifteen days of receipt of the notice of appeal. *See* § 68.11(1), STATS After the hearing is held, the reviewing body has twenty days to make its final determination. *See* § 68.12(1), STATS The appellant may then seek judicial review by certiorari within thirty days of receipt of the final determination. *See* § 68.13, STATS

¶ 35 The ch. 68, STATS, framework for review provides a fixed timetable from the time of the municipal authority's initial determination to the date of the administrative review appeals board's decision. Contrary to City News's assertion, judicial review may not be delayed for an indefinite period of time, as was the case in *Redner v. Dean*, 29 F.3d 1495, 1502 (11th Cir. 1994). There, the licensing scheme was struck down because it stated (1) that an applicant "may" begin operating its establishment "unless and until the County Administrator notifies the

applicant of a denial of the application," and (2) that an appeal will be heard "as soon as the Board's schedule will allow." ***Id.*** at 1500-01. Unlike ***Redner,*** however, ch. 68 does not contain contingencies that leave an applicant at the mercy of the licensor's discretion.

¶ 36 Perhaps more importantly, once the administrative review appeals board has issued its final determination, *See* § 68.12(1), STATS, an appellant may obtain *immediate* judicial review. Review by certiorari must be filed within thirty days of receipt of the final determination. *See* § 68.13(1), STATS We conclude that because the ch. 68, STATS, timetable provides prompt access to judicial review, the dictates of ***FW/PBS*** are satisfied. *See* ***FW/PBS***, 493 U.S. at 227.

5. Public Hearing Provision

¶ 37 City News further argues that an indefinite time period is created as to the public hearing set forth under MUNICIPAL CODE § 8.195(3)(d). This provision states:

> Whenever an application is denied, the City Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter before the Council or its designated committee as hereinafter provided.

While § 8.195(3)(d) provides a ten-day period in which a hearing will be held to review the common council's initial determination, there is no language addressing what is to take place following the hearing. And although

the provision concludes that the public hearing shall be held "as hereinafter provided," ***id.,*** there is no further explanation within § 8.195.

¶ 38 The City responds that City News is precluded from raising this argument because it failed to pursue the public hearing and instead sought alternative means of review under ch. 68, STATS This response must fail, however, because City News has brought a facial challenge alleging invalid prior restraints contrary to the First Amendment and such a challenge may be raised regardless of the recourse City News has pursued. *See* ***Brandmiller v. Arreola,*** 199 Wis.2d 528, 546-47, 544 N.W.2d 894, 902 (1996) ("[I]n asserting an overbreadth challenge an individual may hypothesize situations in which a statute or ordinance would unconstitutionally intrude upon First Amendment rights of third parties."). City News, moreover, has standing to contest this provision because

> [i]n the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license.

Freedman, 380 U.S. at 56.

¶ 39 We agree with City News that MUNICIPAL CODE § 8.195(3)(d) creates a risk of an indefinite delay by putting an applicant at the mercy of the licensing body. While the applicant may receive a public hearing within ten days, the common council is given no direction as to what it must do following the hearing or when it must

presumably take action in response to the hearing. If a decision is to follow, there are no guidelines providing when such a decision must be issued. Therefore, we conclude, consistent with ***Redner,*** that the public hearing provision within § 8.195(3)(d) is unconstitutionally deficient. *See* ***Redner,*** 29 F.3d at 1502.

¶ 40 We are not convinced, however, that the entire ordinance must fail. A court may sever the unconstitutional portions of a statute or an ordinance to leave intact the remainder of the legislation. *See* ***State v. Janssen,*** 219 Wis.2d 362, 378-79, 580 N.W.2d 260, 267 (1998). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." ***Id.*** at 379, 580 N.W.2d at 267 (quoting ***Regan v. Time, Inc.,*** 468 U.S. 641, 653 (1984)).

¶ 41 As a rule of statutory construction, severability is codified under § 990.001(11), STATS, which states:

> The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

¶ 42 In ***City of Madison v. Nickel,*** 66 Wis.2d 71, 223 N.W.2d 865 (1974), our supreme court saved an obscenity ordinance by severing a portion of it that provided an unconstitutional definition of obscenity. *See* ***id.*** at 80, 223 N.W.2d at 870; *see also* ***State v. Zarnke,*** 224 Wis.2d 116, 135-37, 589 N.W.2d 370, 377-78 (1999). In determining

whether a defective section of an ordinance fatally infects the remainder of the law, a court should look to the legislative intent, particularly whether "the legislature would be presumed to have enacted the valid portion without the invalid [portion]." ***Nickel,*** 66 Wis.2d at 79, 223 N.W.2d at 869 (quoted source omitted). If a statute contains distinct parts and the offending parts can be extracted while leaving intact a "living, complete law capable of being carried into effect . . . the valid portions must stand." ***Id.*** at 79-80, 223 N.W.2d at 870 (quoted source omitted). Additional consideration is given to whether the ordinance contains a severability clause.

¶ 43 Although the ordinance in this case does not contain an express severability clause, the "severability intention" of the common council can be gleaned from the purpose and structure of the ordinance. *See* ***Denver Area Educ. Telecomms. Consortium, Inc. v. Federal Communications Comm'n,*** 518 U.S. 727, 767 (1996) (where the Cable Television Consumer Protection and Competition Act did not contain a severability clause, the Court looked to its purpose and structure to decipher the legislature's intent). The common council has clearly expressed its objective in creating the adult establishment licensing ordinance:

> WHEREAS although the provisions of this ordinance have neither the purpose or effect of imposing a limitation or restriction on the content of any communicative materials, the Common Council deems it to be in the interests of the City of Waukesha to provide for licensing and regulation of adult oriented establishments . . . to combat and curb the secondary effects of such establishments.

MUNICIPAL CODE § 8.195 preamble. While there is no stated purpose regarding the methods of administrative review, we fail to see how severance of the public hearing provision would undermine the overriding goal of regulating adult establishments. *Cf.* ***Katt v. Village of Sturtevant,*** 269 Wis. 638, 642, 70 N.W.2d 188, 190 (1955) (where intention of village board could not be carried out by severing one provision, the whole ordinance was void).

¶ 44 Although MUNICIPAL CODE § 8.195(3)(d) may offer an aggrieved applicant an avenue for administrative review, the primary method of review lies under ch. 68, STATS As the common council has provided under § 8.195(11) ("Administrative Review Procedure"),

> The City ordinances and State law shall govern the administrative procedure and review regarding the granting, denial, renewal, non-renewal, revocation or suspension of a license.

In addition, § 2.11(1) of the MUNICIPAL CODE specifically declares that ch. 68 is controlling for purposes of administrative review. As we have already determined, ch. 68 sets forth narrow, definite and objective standards for bringing an appeal, and City News does not directly challenge this chapter.

¶ 45 Based on the purpose and structure of the ordinance, we are certain that the common council would have still enacted the ordinance even without the public hearing provision. Therefore, because we conclude that severance of the invalid provision leaves intact an otherwise complete licensing scheme, we refuse to strike the entire ordinance.

B. Due Process Considerations

1. Impartial Decision Maker

¶ 46 City News claims that it was deprived of an impartial decision maker when Mayor Carol Opel presided over both the common council's initial determination and the administrative review appeals board's subsequent administrative review.[9] We are not persuaded.

¶ 47 Due process protections, including the right to an impartial decision maker, extend to common council proceedings. *See* ***State ex rel. DeLuca v. Common Council,*** 72 Wis.2d 672, 677, 679, 242 N.W.2d 689, 692, 693 (1976). These protections have been adopted under ch. 68, STATS, which guarantees an appellant the right to a hearing on administrative appeal following the municipality's initial determination. *See* §§ 68.10(1)(a), 68.11(1), STATS[10] Section 68.11(2) states that for purposes of the administrative hearing, the municipality must provide "an impartial decision maker, who may be an officer, committee, board, commission or the governing body who did not participate in making or reviewing the initial determination, who shall make the decision on administrative appeal."

¶ 48 The city mayor is directed to preside over common council meetings. *See* § 62.09(8)(b), STATS In this case,

---

[9] The administrative review appeals board is established under CITY OF WAUKESHA, WIS., MUNICIPAL CODE, § 2.11(3) (1995).

[10] An appellant, however, is not granted a hearing on administrative appeal "[i]f the person aggrieved had a hearing substantially in compliance with s. 68.11 when the initial determination was made." Section 68.10(1)(b), STATS

the mayor was present for council meetings addressing City News's license application. The mayor also signed the council's December 19, 1995 resolution denying City News's license application. Later, when the administrative review appeals board conducted its § 68.09, STATS, review, the mayor was one of three individuals who decided to uphold the common council's resolution. City News now argues that because the mayor is the chief executive officer of Waukesha and is entrusted with the power to veto all acts of the common council, see § 62.09(8)(a) and (c), she thereby "participate[d] in making or reviewing the initial determination," § 68.11(2), STATS, by presiding over the council and signing the December 19 resolution. City News claims that by approving the resolution and, in turn, choosing not to exercise her veto power, the mayor disqualified herself as an "impartial decision maker."

¶ 49 ***DeLuca*** is instructive on this issue. There, the court explained that due process protections extend both to the bias and the appearance of bias of the decision maker. "Circumstances which lead to a high probability of bias, even though no actual bias is revealed in the record, may be sufficient to give the proceedings an unacceptable constitutional taint." ***DeLuca,*** 72 Wis.2d at 684, 242 N.W.2d at 695. Following ***Withrow v. Larkin,*** 421 U.S. 35 (1975), the court recognized two circumstances that show "such a high probability of actual bias as to be constitutionally intolerable." ***DeLuca,*** 72 Wis.2d at 684, 242 N.W.2d at 695. The first situation presents itself when the decision maker has a financial interest at stake; the second occurs when the adjudicator has been subject to

"personal abuse or criticism" from the party before it. *See id.*

¶ 50 In the present case, there is no indication that the mayor was influenced by impending financial interests in the outcome of the proceedings or had been the target of any personal abuse from City News. In addition, during the administrative review hearings, the mayor stated that

> I, too[,] believe that I can be an impartial hearer of this testimony. While I have chaired all the common council meetings, I act as a facilitator. I have not offered testimony or debate or spoke to the issue before the council at any time.

These statements support the conclusion that the mayor did not play a role in the decision-making process, and City News has not presented any evidence suggesting that the mayor did more than facilitate the common council's meetings. We agree with the City that under the circumstances the mayor's signature was a purely administrative act and was not indicative of her position on the merits of the dispute. Although the mayor had the power to veto the council's resolution, this discretion did not constitute review of the resolution. Therefore, because we are persuaded that the mayor did not participate in making or reviewing the resolution, we conclude that she was not disqualified from her subsequent participation in the administrative review proceedings.

2. *Adequate Notice*

¶ 51 City News next raises several arguments alleging a lack of sufficient notice as to the charges against it.

As it points out, it has a property interest in the renewal of its operating license. *See* ***Manos v. City of Green Bay,*** 372 F.Supp. 40, 48-49 (E.D. Wis. 1974) (property interest was found for retention of liquor license). Such a property interest warrants the minimal safeguards of procedural due process. *See* ***id.*** at 49. These basic guarantees include providing notice of the charges upon which the license denial was based and giving an opportunity to challenge the charges. *See* ***id.*** at 51.

¶ 52 City News claims that following the issuance of the City's resolution, the City exceeded the scope of the allegations contained therein when it presented testimony from T.M., and related exhibits, at the administrative review hearing.[11] We are not persuaded.

¶ 53 T.M. testified that he was seventeen years old when he entered City News on March 7, 1996, and stole adult magazines. At the administrative hearing, City News objected to T.M.'s testimony because it had not received notice that the City was going to call T.M. and his actions were not mentioned in the December 19, 1995 resolution because the March 7 incident occurred after the common council had issued the resolution. The City responded that T.M.'s testimony was offered to impeach

---

[11] City News also complains that testimony about Jamie Bahr, including Exhibits 36 and 37, should not have been presented because this evidence went beyond the scope of the December 19 resolution. While we understand that the evidence about Bahr concerns a citation for displaying sexual material to minors, City News does not explain, and we cannot readily determine, the substance of the testimony. We therefore decline to address the issue. *See* ***State v. Pettit,*** 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

the prior testimony of City News employee David Hull concerning City News's personal identification policy and the fact that Hull had been issued a citation for permitting a minor to loiter on its premises. The administrative review appeals board noted City News's objection but nonetheless permitted T.M. to testify.[12]

¶ 54 We agree with the City. T.M.'s testimony was not used as a new ground for rejecting City News's license application. Rather, it was brought for the purpose of impeaching Hull's testimony that he abided by the store's policy of checking the identification of every person who appeared younger than thirty years of age. City News admitted as much in its proposed findings of fact for the administrative review appeals board where it stated, "[W]e find that [T.M.'s] testimony is not credible and is not sufficient to rebut the testimony of David Hull, the purpose for which it was offered." The administrative review appeals board's findings are also telling. There, the board relies upon the testimony of police officers who observed minors loitering on City News's premises and patrons engaging in sexual activity, and upon a building inspector's report regarding the size of the viewing booths. There is no mention, however, of T.M. We conclude, therefore, that the admission of T.M.'s testimony did not implicate due process protections.

¶ 55 Next, City News complains that it was denied adequate notice of a November 7, 1995 open booth violation that was raised at the administrative review hearing

---

[12] The administrative review appeals board explained that it was its policy to note all objections but to nonetheless receive the evidence and determine its weight upon deliberation.

but not cited in the December 19 resolution. The resolution cited three open booth violations for which City News's operator received ordinance citations and was subsequently convicted. The resolution states:

> WHEREAS, on 11/30/94, 12/1/94 and 12/2/94 City News and Novelty, Inc. through its employees and/or agents violated the provisions of section 8.195(9)(b)2 of the Waukesha Municipal Code by failing to have every booth, room or cubicle totally open to a public lighted aisle so [as to] permit[ ] an unobstructed view at all times of anyone occupying the same.

During the administrative review, however, city building inspector Marvis Lemke reported that while City News's booths had violated the open booth ordinance upon his annual inspection on November 7, by November 30 the booth entrances had been reopened to an acceptable level. In the administrative review appeals board's findings, the board included Lemke's November 7 inspection report and mentioned the three ordinance violations. City News now claims that it had no notice of the November 7 open booth violation.

¶ 56 City News was provided sufficient notice to defend against the November 7 booth violation. First, MUNICIPAL CODE § 8.195(7)(d) advises that "[t]he building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance." City News therefore had notice that an inspection would be made before its license would be renewed. Second, City News does not deny that it received citations for and was convicted of open booth violations occurring on November 30 and December 1

and 2, 1994. The December 19 resolution cited these violations. Third, the basis of all of the open booth violations was the same – City News's use of wood paneling to narrow the booth openings, thereby creating an obstructed view of the booths.

3. *Sanctions Imposed*

¶ 57 City News next raises the issue of whether the City's response to its alleged violations of the ordinance, which was to invoke the most severe form of sanction and deny renewal of the license, passes constitutional muster. City News claims that the City acted unreasonably in "saving up" all of its complaints past the point where City News could effectively remedy them prior to renewal. City News argues that by utilizing a "sub rosa theory of strict liability without ever articulating it as such," the City has offended procedural due process requirements.

¶ 58 The City responds that the issue of whether it may deny a license renewal application rather than issue a license suspension or revocation is solely a matter of discretion for the licensing body. It asserts that there is no licensing requirement that it first provide a warning, a suspension or some lesser penalty before nonrenewal is appropriate. It adds that City News has failed to cite any authority addressing the issue of the appropriateness of particular sanctions sought by a municipality based upon ordinance violations.

¶ 59 We agree with the City that there is no authority requiring a municipality to pursue a lesser sanction or the

least restrictive sanction in the event of an ordinance violation. There are, however, particular procedural due process considerations at play. These include providing notice of the charges, an opportunity to respond to and challenge the charges, an opportunity to present witnesses, and an opportunity to confront and cross-examine opposing witnesses. *See* ***Manos,*** 372 F.Supp. at 51. In this case, we have already determined that City News was provided adequate notice of the charges. In addition, there is no dispute that it was afforded an opportunity to challenge the charges.

¶ 60 We next consider the particular types of sanctions available when an operator violates the ordinance. First, there is nonissuance and nonrenewal of a license. This measure is conditioned upon an applicant having violated a provision of the licensing scheme within five years of the application. Second, revocation of a license for one year is similarly available where "[t]he operator or any employee of the operator violates any provision of this section or any rules or regulation adopted by the Council pursuant to this section." MUNICIPAL CODE § 8.195(8)(a)2. Finally, a suspension of thirty days or less may be invoked "in the case of a first offense by an operator where the conduct was solely that of an employee . . . if the Council shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of due diligence have had such actual or constructive knowledge." ***Id.***

¶ 61 Suspension is inappropriate here because the board specifically found that a director of City News had committed various violations of the ordinance. According

to the board's June 28, 1996 findings, Police Officer Richard Piagentini observed a minor patron on City News's premises on December 24, 1994, and City News director Daniel Bishop was subsequently convicted for permitting the minor on the premises contrary to MUNICIPAL CODE § 8.195(10)(c). The findings indicate that Bishop also received convictions for three other ordinance violations based on City News's failure to maintain open viewing booths pursuant to § 8.195(9)(b)2. Therefore, because a director of City News was found to have contravened the ordinance, we attribute knowledge of the violations to City News. We further note that the violations cited by the board were not solely at the hands of an employee. Thus, suspension is not an available sanction in this case.

¶ 62 While revocation and nonrenewal both rely upon a violation of the ordinance, we believe the City properly exercised its discretion in deciding to impose a nonrenewal sanction. In its findings, the board listed nine separate ordinance violations occurring within a one-year period. Four of these involved minors loitering on the premises, three involved open booth violations and two dealt with customers masturbating in viewing booths. In its preamble, the ordinance speaks to particular health and safety concerns endemic to adult-oriented establishments. Such concerns include the transmission of AIDS and other sexually transmitted diseases and increased levels of criminal activity such as prostitution, rape and assaults. Considering both the health and safety issues as well as City News's record of ordinance violations, we are satisfied that the City acted within its discretion.

C. Sufficiency of Nonrenewal Grounds

¶ 63 Finally, City News asserts that the grounds upon which the nonrenewal determination was based were inadequate as a matter of law. It claims that citations issued to patrons in February and March 1995 for lewd and lascivious conduct cannot stand as a basis for nonrenewal.[13] City News further argues that because the standards for issuance of a new license concern only the conduct of officers, directors and stockholders of the corporation,[14] the conduct of patrons is immaterial. City News is wrong.

---

[13] The administrative review appeals board's findings were, in pertinent part, as follows:

> 1. On February 28, 1995, Officer John Gibbs observed a patron of City News and Novelty, Inc. . . . masturbating in a viewing booth. . . . There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20, Wis. Stats. . . .
>
> 2. On March 11, 1995, Officer Paul De Jarlais observed a patron at City News . . . masturbating in a viewing booth. There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20, Wis. Stats. . . .

[14] MUNICIPAL CODE § 8.195(4)(b)2 provides, "No officer, director, or stockholder required to be named under par. (3)(b) shall have been found to have previously violated this section within 5 years immediately preceding the date of the application."

¶ 64 As we have previously outlined, the ordinance contains specific restrictions under subsecs. (9) and (10) that stand apart from the general licensure standards under MUNICIPAL CODE § 8.195(4)(b). One such requirement is that no occupants of booths, rooms or cubicles shall engage in any type of sexual activity. *See id.* § 8.195(9)(c). At the end of the licensing scheme, the ordinance states generally that "[t]he operator shall insure compliance of the establishment and its *patrons* with the provisions of this section." *Id.* 8.195(10)(f) (emphasis added). "Operator" is defined as any "person, partnership, or corporation operating, conducting, maintaining or owning any adult-oriented establishment." *Id.* § 8.195(1).

¶ 65 It is clear from the ordinance that City News is the operator here and that when patrons were issued citations for and convicted of lewd and lascivious behavior, City News violated the ordinance by not ensuring compliance with the para. (9)(c) prohibition on sexual activity. A plain reading of the ordinance does not limit the City's review to only the conduct of officers, directors and stockholders. If it did, then the conduct of employees, including permitting the exposure of sexual material to minors, would be of no consequence. City News's position, therefore, contravenes the explicit condition that actions of "any employee constituting a violation of the provisions of this section" are imputed to the operator for purposes of determining revocation, suspension or renewal. *See id.* § 8.195(10)(b). We reject this narrow reading of the ordinance.

¶ 66 City News next asserts that the testimony of police officers that minors had been found loitering in the

store on three separate occasions[15] was insufficient evidence as a matter of law to qualify as a "finding," as this concept is used within the licensing ordinance. *See id.*

---

[15] The administrative review appeals board's findings stated the following:

> 2. On July 23, 1995, Officer John Konkol observed S.S., a patron, at City News . . . who was a minor. Officer Konkol made the observation while on duty. Additionally, S.S. testified that she was a patron at City News . . . on July 23, 1995 and . . . was a minor. Christopher Alverson, the employee on duty at the time, was convicted of a civil ordinance violation contrary to Section 8.195, Subsection 8.195(10)(c) of the Municipal Code of Waukesha on August 25, 1995. There was no evidence to refute the credible testimony of Officer Konkol or S.S.
>
> 3. On October 18, 1995, Officer Mark Howard observed S.D., a patron, at City News . . . who was a minor. Officer Howard made the observation during the course of a routine investigation. Additionally, S.D. testified that he was a patron of City News . . . on October 18, 1995 and . . . was a minor. There was no evidence to refute the credible testimony of Officer Howard and S.D.
>
> 4. On November 29, 1995, Officer Paul Paikowski observed a patron of City News . . . who was a minor. Officer Paikowski made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News. . . . There was no evidence to refute the credible testimony of Officer Paikowski.

Because the July 23 incident led to a conviction, City News is wrong in stating that it "has never been convicted, even in municipal court, of these violations." City News is otherwise correct that the October 18 and November 29 incidents did not result in convictions.

§ 8.195(4)(b)2 ("[N]o officer, director, or stockholder . . . shall have been *found* to have previously violated this section. . . . "). (Emphasis added.) In reviewing the board's findings, we apply the substantial evidence test to determine whether the evidence is sufficient. *See* ***Clark v. Waupaca County Bd. of Adjustment,*** 186 Wis.2d 300, 304, 519 N.W.2d 782, 784 (Ct. App. 1994). Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the board. *See id.* The substantial evidence test is highly deferential and we may not substitute our view of the evidence for that of the board. *See id.*

¶ 67 We conclude that substantial evidence supported the board's findings. At the administrative hearings, a police officer testified to each of the three incidents involving minors. Each observation made by the officers took place while the officer was on duty. For two of these incidents, the minor involved testified to his or her conduct. This evidence was substantial and City News has failed to present any evidence to refute the testimony of the officers or the minor patrons.

¶ 68 Finally, City News seeks to refute evidence of a fourth incident involving a minor loitering on its premises. At the administrative hearings, an officer testified that while on patrol he observed a minor at City News on December 24, 1994. The board's findings indicate that an employee and a director of City News were convicted of civil ordinance violations for this incident. City News now contends that because these convictions were later dismissed on appeal and because a conviction must stand to qualify as a finding of the board, this incident carries

no weight in support of the board's decision. We disagree.

¶ 69 First, City News provides no authority to support its view that only a conviction can constitute a finding of the board. Contrary to this position, the board has the discretion to make its own findings of fact based on the evidence presented. As was the case with the July 23, October 18 and November 29, 1995 incidents involving minors, an officer testified that he observed a minor patron on City News's premises. This evidence was not refuted by City News, and while the convictions of the employee and director were dismissed, the board was still justified in relying on the evidence presented at the hearings. Because we conclude that the board's findings are supported by a reasonable view of the evidence, *see* ***Snyder v. Waukesha County Zoning Bd. of Adjustment,*** 74 Wis.2d 468, 476, 247 N.W.2d 98, 103 (1976), City News's argument is without merit.

CONCLUSION

¶ 70 While City News's due process and sufficiency of the evidence challenges fail, we agree that the public hearing provision under § 8.195(3)(d) of the MUNICIPAL CODE is constitutionally deficient. However, rather than striking the entire ordinance, we conclude that § 8.195(3)(d) is severable and thus reverse as to this provision and affirm as to the remainder.

Costs are denied to both parties.

By the Court. – Judgment affirmed in part and reversed in part.

Recommended for publication in the official reports.

No. 97-1504

IN COURT OF APPEALS OF WISCONSIN
DISTRICT II

CITY NEWS & NOVELTY, INC.,	**FILED**
PLAINTIFF-APPELLANT,	**Mar 18, 1998**
v.	**Marilyn L. Graves Clerk of Supreme Court**
CITY OF WAUKESHA,	**Madison, WI**
DEFENDANT-RESPONDENT.	

CERTIFICATION BY COURT OF APPEALS OF WISCONSIN

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to RULE 809.61, STATS., this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.[1]

ISSUES

1. Is an "adult-oriented establishments" municipal ordinance that fails to preserve the status quo during the administrative license renewal process facially unconstitutional?

[1] The parties raise and argue additional issues in the briefs; however, we certify only the following three issues for supreme court review.

2. Is the ordinance unconstitutional if it fails to provide express time limits for judicial review?

3. Can a municipality enforce the ultimate ordinance sanction (license denial) without affording the license holder timely opportunity to remedy alleged violations?

STATEMENT OF FACTS

City News and Novelty, Inc. is an adult-oriented establishment in the City of Waukesha. It is licensed annually under the provisions of § 8.195 of the CITY OF WAUKESHA, WIS., MUNICIPAL CODE (1995). On November 15, 1995, City News applied for renewal of its license; its license was due to expire on January 25, 1996.[2] The code provides that "[w]ithin twenty-one (21) days of receiving an application for a license the City Clerk shall notify the applicant whether the application is granted or denied." *Id.* at § 8.195(3)(c).

On December 19, 1995, the common council passed a resolution that found City News had committed several violations of the ordinance and as a result denied the renewal of its license. City News requested administrative review of this decision; after holding administrative hearings and receiving briefs, the Waukesha Administrative Review Board affirmed the City's decision on June 28, 1996. City News then filed a certiorari action in circuit court and sought judicial review of the denial of its

[2] The ordinance requires that a renewal application must be filed "not later than sixty (60) days before the license expires." CITY OF WAUKESHA, WIS., MUNICIPAL CODE § 8.195(7)(a) (1995).

license renewal. The circuit court affirmed the decision of the Board in a decision filed April 2, 1997.

DISCUSSION

Preserving the Status Quo

The first issue certified is whether the ordinance is unconstitutional because it fails to explicitly preserve the status quo throughout the administrative process. According to the Supreme Court in ***FW/PBS, Inc. v. City of Dallas,*** 493 U.S. 215 (1990), a licensing scheme that exists as a prior restraint on businesses that purvey sexually explicit but protected speech is constitutionally permissible if it contains safeguards to minimize the possibility that the licensing procedure will be used to suppress speech. *See* ***id.*** at 226. The Court then set out several requirements which licensing ordinances must include in order to pass constitutional scrutiny.

First, the regulatory scheme cannot place " 'unbridled discretion in the hands of a government official or agency.' " ***Id.*** at 225 (quoting ***City of Lakewood v. Plain Dealer Publ'g Co.,*** 486 U.S. 750, 757 (1988)). In other words, if a permit or license may be granted or withheld solely at the discretion of a government official, this is an "unconstitutional censorship or prior restraint" upon the exercise of the freedom of speech. *See* ***id.*** at 226. Second, it is impermissible for a prior restraint to not place limits on the time within which the decision maker must issue or deny a license. *See* ***id.*** The Court held that a licensing decision must be made "within a specific and reasonable time period during which the status quo is maintained." ***Id.*** at 228. Finally, a regulatory scheme must

provide for "prompt judicial review" in the event that a license is erroneously denied. *See* ***id.***

In ***Wolff v. City of Monticello,*** 803 F. Supp. 1568, 1574 (D. Minn. 1992), a federal district court applying ***FW/PBS*** referenced the above-quoted statement and went on to conclude that because the ordinance under scrutiny in that case did not include a *specific provision* which assured that the status quo would be maintained, it was unconstitutional under ***FW/PBS***. *See* ***Wolff,*** 803 F. Supp. at 1574. The ***Wolff*** court concluded that because the ordinance did not preserve the status quo "on its face," the city's promise that it would take no action to enforce the ordinance prior to a final decision on the license application did not comply with ***FW/PBS***. *See* ***Wolff,*** 803 F. Supp. at 1575.

The City does not dispute the general requirements of ***FW/PBS***. However, the City contends that because its ordinance provides that a decision to grant or deny the application for a license must be made within twenty-one days, the above requirements are met. Because a license renewal is required to be filed sixty days before the expiration of the current license, the City argues that the status quo is automatically maintained because by adhering to the statutory time line outlined by the statute, "the ability to continuously operate the adult oriented establishment is not interrupted. . . . The status quo is preserved because the 21 day period runs prior to the expiration of a license."[3]

---

[3] We note that thirty-four days passed between City News' filing for renewal on November 15 and the common council's resolution which denied the renewal on December 19.

There is no Wisconsin law on this issue. There is also no Supreme Court statement on whether the absence of an explicit status quo provision renders an ordinance facially unconstitutional under ***FW/PBS***. Because this issue will greatly impact local municipalities' regulation of adult-oriented establishments, we respectfully request that the state's highest court decide this issue.

Prompt Judicial Review

Related to the first issue is the question of whether the City's ordinance is unconstitutional because it fails to provide express time limits for judicial review. The City cites to ***Chesapeake B & M, Inc. v. Harford County, Md.***, 831 F. Supp. 1241 (D. Md. 1993), in support of its position that *access to* judicial review is all that is required. However, the district court's holding that "a licensing ordinance need only provide for the availability of prompt judicial review," *see id.* at 1250, was reversed on appeal.

On review the Fourth Circuit stated that "[f]or the reasons announced today in our en banc opinion in ***11126 Baltimore Blvd., [Inc. v. Prince George's County, Md.***, 58 F.3d 988 (4th Cir. 1995)], we agree that prompt judicial review means *a sufficiently prompt decision on the merits.*" ***Chesapeake B & M, Inc. v. Harford County, Md.***, 58 F.3d 1005, 1012 (4th Cir. 1995) (emphasis added). As explained in ***11126 Baltimore Boulevard***, other cases prior to ***FW/PBS***, including the seminal case of ***Freedman v. Maryland***, 380 U.S. 51 (1965), had used the term "prompt judicial review" to mean a *prompt judicial determination*. *See* ***11126 Baltimore Blvd.***, 58 F.3d at 999-1000. Coupling that history with the Court's decision in ***FW/PBS***, the

court concluded that the decision in ***FW/PBS*** must be read as maintaining the ***Freedman*** requirement of a prompt judicial determination of the issue.[4] *See* ***11126 Baltimore Blvd.***, 58 F.3d at 1000.

---

[4] *See, e.g.*, ***Freedman v. Maryland***, 380 U.S. 51, 59 (1965) ("[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"); ***Southeastern Promotions, Ltd v. Conrad***, 420 U.S. 546, 561-62 (1975) (judicial decision on the merits which was not obtained for five months did not comport with "prompt judicial review"); ***United States v. Thirty-Seven Photographs***, 402 U.S. 363, 372 (1971) (using "prompt judicial review" as synonymous with "prompt judicial determination"); ***Blount v. Rizzi***, 400 U.S. 410, 417 (1971) (stating that the ***Freedman*** Court held that a scheme of administrative censorship must require prompt judicial review, defined as "a final judicial determination on the merits within a specified, brief period" in order to avoid constitutional infirmity).

However, in cases subsequent to ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215 (1990), the federal appellate courts are split. *See, e.g.*, ***TK's Video, Inc. v. Denton County, Tex.***, 24 F.3d 705, 709 (5th Cir. 1994), and ***Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth***, 984 F.2d 1319, 1327 (1st Cir. 1993) (both cases hold that the requirement of "prompt judicial review" is satisfied by providing access to the courts after an administrative denial). *But see* ***East Brooks Books, Inc. v. City of Memphis***, 48 F.3d 220, 224-25 (6th Cir. 1995) (unequivocally rejecting the argument that mere access to judicial review satisfies the prompt judicial review requirement). It should be noted that in neither the ***TK's Video*** nor ***Jews for Jesus*** decision did the court attempt to analyze how the conclusion it reached was consistent with Supreme Court precedent in this area. *See* ***11126 Baltimore Blvd., Inc. v. Prince George's County, Md.***, 58 F.3d 988, 1000 n. 17 (4th Cir. 1995).

In the instant case, the ordinance is silent as to any provision which addresses the timeliness of judicial review of the administrative review process. The City claims that prompt judicial review of a board's determination is provided by § 68.13, STATS., and that under ***FW/PBS***, this is all that is required. However, as discussed above, this analysis does not square with a significant body of case law preceding ***FW/PBS***. On the other hand, if a prompt judicial *determination* is required in order to comply with ***FW/PBS***, how can a local governing body pass an ordinance containing directives or requirements that the circuit courts of the state answer issues of this type within a specified time period? None of the cases calling for a prompt judicial determination have squarely addressed this issue, although ***11126 Baltimore Boulevard*** suggests that if a licensee is permitted to operate until a judicial determination is rendered, the constitutional problem could be avoided. *See* ***11126 Baltimore Blvd.***, 58 F.3d at 1001 n. 18.

Sanctions Imposed

The third issue is whether the City's response to alleged violations of the ordinance, which was to invoke the most severe form of sanction and deny renewal of the license, passes constitutional muster. City News claims that the City acted unreasonably in "saving up" all of its complaints past the point where City News could effectively remedy them prior to renewal. By utilizing a "sub rosa theory of strict liability without ever articulating it as such," City News claims that the City has offended procedural due process requirements. While the ordinance provides for a maximum suspension of thirty days

if a violation occurs without the actual or constructive knowledge of the operator of the establishment, *see* MUNICIPAL CODE, § 8.195(8)(a)2, in this case the City compiled a number of violations, including citations given to patrons of the store, and utilized these violations as the basis for not renewing City News' license to operate.

According to the Supreme Court, content-based restrictions on speech "must be subjected to the most exacting scrutiny." ***Boos v. Barry,*** 485 U.S. 312, 321 (1988). Although time, place or manner restrictions have never been subject to the same "strict scrutiny," if a regulation is content-based it is subject to a least-restrictive-alternative analysis. *See* ***Ward v. Rock Against Racism,*** 491 U.S. 781, 798 n.6 (1989). Such a regulation must be "narrowly tailored" and a less-restrictive alternative cannot be readily available. *See* ***Boos,*** 485 U.S. at 329.

At issue in the instant case is whether the ordinance is constitutionally infirm because it allows the drastic sanction of nonrenewal to be invoked without first implementing the lesser penalty of suspension. City News claims that because the ordinance operates as a prior restraint, it is subject to the least-restrictive-alternative requirement. *See* ***Ward,*** 491 U.S. at 798-99 & n.6. In response, the City asserts that "[t]here is no requirement in the ordinance, nor need there be a requirement that the appellant should first be subject to a warning, a suspension or some other lesser penalty before nonrenewal is appropriate. *This is a matter totally within the discretion of the licensing authority.*" (Emphasis added.)

In several federal cases the least-restrictive-means analysis has been used to invalidate portions of prior

restraint ordinances. *See Genusa v. City of Peoria*, 619 F.2d 1203, 1219 (7th Cir. 1980) (stating that the city is required to "demonstrate the existence of a substantial and legitimate state interest that is unrelated to the suppression of free expression and that cannot be effectuated by means that impact less drastically on protection freedoms"); ***Suburban Video, Inc. v. City of Delafield***, 694 F. Supp. 585, 592 (E.D. Wis. 1988) (disclosure requirements that invade plaintiffs' privacy without any legitimate justification are prohibited by the First and Fourteenth Amendments). City News claims that under a least-restrictive-means analysis, the City's nonrenewal of its license to operate without affording it an opportunity to remediate any violations did not afford City News procedural due process and this failure calls into question the constitutionality of the ordinance.

Because these issues impact the ability of municipalities to fairly license and regulate the operation of adult-oriented businesses and because there is an absence of precedent-setting state or federal law in this area of constitutionally sensitive expression, we respectfully request the Wisconsin Supreme Court to accept jurisdiction.

[Seal]

Office of the Clerk
SUPREME COURT
110 E. MAIN STREET SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640

To:

Hon. Robert G. Mawdsley
Waukesha County Circuit Court
515 W. Moreland Blvd.
Waukesha, WI 53188

Curt R. Meitz
Julie M. Gay
City Attorney's Office
201 Delafield Street
Waukesha, WI 53188

April 21, 1998

Jeff Scott Olson
Jeff Scott Olson Law Firm
44 East Mifflin Street, #403
Madison, WI 53703

You are hereby notified that the Court has entered the following order:

No. 97-1504 *City News & Novelty, Inc. v. City of Waukesha*
L.C.#96CV1427

The appeal in this case having been certified from the court of appeals to this court pursuant to Wis. Stat. § 808.05(2);

IT IS ORDERED the certification is refused.

Shirley S. Abrahamson, C.J., concurs but would have the court state its reasons for refusing certification.

Marilyn L. Graves
Clerk of Supreme Court

[Seal]

Office of the Clerk
SUPREME COURT
110 E. MAIN STREET SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640

January 18, 2000

To:

Hon. Robert G. Mawdsley
Waukesha County Circuit Court
515 W. Moreland Blvd.
Waukesha, WI 53188

Jeff Scott Olson
The Jeff Scott Olson Law Firm, S.C.
44 E. Mifflin Street, #403
Madison, WI 53703

Curt R. Meitz
Julie M. Gay
City Attorney's Office
201 Delafield Street
Waukesha, WI 53188

You are hereby notified that the Court has entered the following order:

No. 97-1504 *City News & Novelty, Inc. v. City of Waukesha* L.C.#96CV1427

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, City News & Novelty, Inc., and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

STATE OF WISCONSIN
CIRCUIT COURT BR. 11
WAUKESHA COUNTY

CITY NEWS & NOVELTY, INC.,

Plaintiff,

-vs-

CITY OF WAUKESHA,

Defendant.

CASE NO. 96-CV-1427

DECISION

(Filed Apr. 2, 1997)

Plaintiff, City News & Novelty, seeks certiorari review of defendants', City of Waukesha and City of Waukesha Administrative Review Board, decisions not to renew their license to operate an adult oriented establishment at 245 West Main Street in the city of Waukesha. Plaintiff contends that the action of the defendant in failing to renew plaintiff's license was unlawful because the licensing ordinance is unconstitutional and represents unconstitutional restraint; plaintiff contends that it was denied due process with respect to notice and an impartial tribunal; further the plaintiff contends that the record is inadequate as a matter of law to support the findings of the Administrative Review Board.

Review on certiorari is limited to whether, (1) the board kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive, unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the

order or determination in question. *Coleman v. Percy*, 96 Wis. 2d 58, 588 (1990). On review courts should be "hesitant to interfere with the administrative determinations and accord the decision of the board [of appeals] a presumption of correctness and validity." *Snyder v. Waukesha Zoning Board*, 74 Wis. 2d 468, 476 (1976). Further on certiorari this court may not disturb the Board's findings if they are sustained by any reasonable view of the evidence nor substitute its discretion for that of the Board.

Plaintiff contends that the Waukesha Licensing Ordinance Section 8.195 under which the City Administrative Review Board acted is facially unconstitutional. Ordinarily, certiorari is confined to a review of the decisions of an administrative agency. Common councils and boards of review are not empowered to declare legislation unconstitutional. Such bodies can determine whether constitutional elements of due process have been accorded applicants. *Kmiec v. Town of Spider Lake* 60 Wis. 2d 640, 645 (1973). Some cases hold that declaratory judgment is the vehicle for a test of constitutionality. The court after research concludes that the case of *Omernick v. Department of Natural Resources*, 100 Wis. 2d 234 (1981) sets the procedural policy for Wisconsin:

> We believe *Cobb* reflects a fundamental policy that parties to an administrative proceeding must raise known issues and objections and that all efforts should be directed toward developing a record that is as complete as possible in order to facilitate subsequent judicial review of the record under Section 227.20 Stats. That policy, applicable in this case as it was in *Cobb*, requires that those constitutional issues be raised even

> though the administrative agency is without power to decide them. p. 248.

Plaintiff did not specifically address the constitutional issues in the hearings before the Administrative Review Board; however in January of 1996, in a "request for a review" of the determination of the Common Council, the specific constitutional infirmities of 8.195 alleged by the plaintiff were listed. In a footnote, the plaintiff noted that it was reserving the "right to raise issues pertaining to the constitutionality of Section 8.195 in state or federal court in an appropriate action at an appropriate time." The brief supporting the request concludes with a paragraph that contains the following language: "In particular, the omission of any constitutional arguments is not intended as a waiver of said arguments because the applicant understands that the Council does not have jurisdiction to declare any portion of the City's ordinances unconstitutional. The applicant intends to raise the constitutional issues in a appropriate forum." From this record, the court concludes that the plaintiff has raised specifically the constitutional issues and under the *Omernick* case the court has jurisdiction to decide them. Contrary to defendant counsel's belief, plaintiff is not attacking Wisconsin Statute Chapter 68.

The first issue concerns the plaintiff's assertion that no explicit standards for renewal of licenses are contained in the defendant's ordinance. The plaintiff contends that the Board was acting against the law in utilizing the standards for granting of a new license under Section 8.195 (4). Plaintiff argues the holdings in these cases support their position: *Renton v. Play Time*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed. 19, (1986); *City of Lakewood*

v. Plain Dealer Publishing Company, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed. 771, (1988); and *Wolff v. City of Monticello*, 803 F.Sup. 1568 (Minnesota, 1992).

Defendant argues that plaintiff's counsel conceded the propriety of utilizing the standards under 8.195 (4) because plaintiff's counsel submitted findings of fact and conclusions of law to the administrative review board adopting same as the standards for renewal. The court does not find this argument of the defendant to be persuasive.

Defendant next observes that the language of 8.195 was analyzed in *Suburban Video v. City of Delafield*, 64 F.Sup. 585, (E.D. Wis., 1988). The Delafield ordinance has the same language with respect to "renewal" and other strictures as the Waukesha ordinance. This court finds that the constitutionality is not only presumed but confirmed by precedent. Defendant further argues that a reading of the entire ordinance reveals that the granting of new licenses, suspensions, revocations and renewals is dictated by the same standards: i.e., the presence or absence of violations of the sections of the ordinance. In a reply brief, plaintiff notes the denotations of "issue" and "renew" are quite separate. The court finds that in Section 8.195(4) the word "issuance" (a nominalization) only appears in the heading. The headings (STANDARDS FOR ISSUANCE OF LICENSE, FEES, RENEWAL OF LICENSE OR PERMIT, REVOCATION OF LICENSE) and the numerical enumeration are matters of style and indexing. The headings and enumerations are not operative parts of the legislation. When Section 8.195(4) is read in conjunction with 8.195(10) (b) the language demonstrates that the standards for obtaining a license apply.

The *City of Lakewood* case is distinguishable because the ordinance in question contained no standards. *Wolff* is also inapplicable because the format and language of the ordinance in that case was quite different from the Waukesha city ordinance. Therefore the court concludes that the ordinance is explicitly with respect to the standards to be applied when an applicant seeks renewal and the Administrative Review Board did not act unlawfully.

Plaintiff next asserts that the language of the ordinance permits unbridled discretion because Section 8.195(4) (d) (2) is vague. The plaintiff argues that the words "shall have been found" is not defined and is open to subjective decision making. The plaintiff contends that the language can't survive a vagueness challenge. The concern here is heightened because of the ordinance requirement to renew annually. *City of Lakewood, supra*, 760. The court finds that Judge Evans reviewed the same language with approval in *Suburban Video v. The City of Delafield*; also the plaintiff has cited no case stating that use of the word "found" is improper. The court notes that the forms of the verb "to find" are part and parcel of legal procedure. "To find" is to make a determination of fact; it's the act of an adjudicator after investigation or hearing. The cases cited by plaintiff all concern criminal statutes and involve whether the prohibited conduct is stated clear enough. *State v. Courtney*, 74 Wis. 2d 705, (1976); *State v. Tronca*, 84 Wis. 2d 88, (1977); *State v. Pompanz*, 112 Wis. 2d 166, (1983).

Plaintiff does not attack the nature of the conduct which "if found" constitute a violation of the ordinance. This court finds that the past perfect subjunctive "shall have been found to have violated" sets limits on the

municipal body rather than granting unbridled discretion. The Common council can only act when facts or evidence of a violation exist. The action is then subject to review under the substantial evidence test. The language is not vague.

The next two constitutional challenges can be combined: the challenges in regard to time limits; and for failure to preserve the status quo throughout the review process. The court agrees with the plaintiff that the review in this area must be confined to the statutory language and not the chronology of plaintiff's own renewal process. Because an applicant may choose to waive a time limit or because the Council did not upset the status quo are not relevant.

The importance of time limits is clear:

> The core policy underlying *Freedman* is that the license for a first amendment protected business must be issued within a reasonable period of time, because undo [sic] delay results in the unconstitutionality suppression of protected speech. *FW/PBS, Inc., v. Dallas*, 493 U.S. 215, 224, 110 S.Ct., 603.

The court does not find that 8.195(7) (c) – filing by police department, and (7) (d) – inspection by the building inspector create the capability to delay the decision on the grant or denial of a license. The sections do not change the 21-day time period after receiving an application for a license. In *FW/PBS v. Dallas*, the license was conditioned on an inspection by "health and fire departments and building officials" for compliance with other ordinances. No time limit was set for the inspections. In

the case at hand, the grant or denial is not conditioned on inspection and compliance.

Plaintiff next argues that, consistent with *Redner v. Dean*, 29 F. 3d, 1495, (11th Cir. 1994), the ordinance is defective because there is no time limit on the Common Council to decide after the public hearing specified in 8.195(3) (d).

> (d) Whenever an application is denied, the city clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within ten days of receipt of notice of denial, a public hearing shall be held within ten days thereafter before the council or its designated committee as here in after provided.

This subsection must be read, with respect to procedures and time limits, in conjunction with Section 2.11 which adopts Chapter 68 of the Wisconsin Statutes.

> 8.195(11) ADMINISTRATIVE REVIEW PROCEDURE. The City ordinances and State Law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

The ordinance and the statute establish a licensing scheme which does not allow "unbridled discretion in the hands of government official or agency."

Reference to the provisions of Chapter 68 negates the arguments of the plaintiff. The city clerk notifies the applicant in writing whether the application is granted or denied, 8.195 (3). This is a determination according to 68.01. At this point, the applicant can ask for a public hearing which must be held within ten days. 8.195 (3);

and/or the applicant may proceed under 68.08, a request for review. The review has time limit of 15 days pursuant to 68.09. The applicant has other options under 68.10 which has time limits for review and decision. (68.11 and 68.12).

In the same case at hand plaintiff chose to file a request under 68.08 immediately after the Common Council made the initial determination to deny the license renewal. The applicant does not bear any burden; the applicant merely chooses which facet of review to pursue and the City must follow the prescribed time limits. The court finds this licensing scheme comports with the holding in *FW/PBS, Inc., v. Dallas*; there is not part of the licensing scheme that allows indefinite postponement of the issuance or renewal of the license.

Plaintiff raises the question of preserving the status quo. None of the cases cited deal with status quo for renewals. The city did not address this issue in their brief. Again the fact that the Council did not halt the plaintiff's operation during the renewal and review process is not dispositive of the challenge.

Time limits and status quo go hand in hand. The most instructive case is *T.K.'s Video, Inc., v. Denton County Texas*, 24 F. 3d 705 (5th Circuit 1994):

> Nor is this unduly restrictive, given the availability of expeditious judicial review. A rejected license applicant has 30 days to seek judicial relief before the order of the director of public works becomes final.
>
> This does not answer the further question of how much of the total licensing process must be

> complete within the specified brief period, specifically whether the brief period includes completion of judicial review. Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.*, and some uncertainty in the language of Justice O'Connor's opinion in the same case we read the supreme court to insist that the state must offer a fair opportunity to complete the administrative process an access to the courts within a brief period. A brief period within which all judicial's avenues are exhausted would be an oxymoron.
>
> *T.K.* objects that the order does not provide automatic and prompt judicial review or an automatic stay of an order denying a license. As we explained the order provides that filing a notice of appeal to the state district court of Denton County stays an administrative decision revoking or suspending a license so the focus of T.K.s intentions is on the absence of stay of an order denying a license. *FB/PBS* [sic] requires only a prompt judicial hearing, a standard that the order meets by giving an unsuccessful license applicant 30 days to appeal to a district court in Denton County "on a trial de novo basis." The availability of expeditious judicial review obviates the need for automatic stay. Citation omitted page 709.

The court concludes that the license renewal scheme of 8.195 obviates the need for an automatic stay. The application must be filed at least 60 days before the license terminates; the applicant must be notified within 20 days of the grant or denial; review by ordinance or chapter 68 can be completed within 10 to 15 days. A hearing on the appeal under 68.10 must be heard within

15 days and a determination made within 20 days of the completion of the hearing under 68.12. The scheme provides that most of the review process can be completed prior to the expiration of the one year term of the license.

On the question of whether the ordinance on its face provides for prompt judicial review, the court has read the cases and arguments presented by both counsel. The court concludes that the ordinance in Section 8.195(11) provides access to prompt judicial review under Wisconsin Statute Chapter 68. Section 68.001 provides as follows:

> 68.001. Legislative purpose. The purpose of this chapter is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protection under the 14th amendment to the U.S. Constitution.

In particular, the judicial review by certiorari can be accessed under 68.10(1) (b) as well as after the decision by the Administrative Review Board. Under the circumstances, this court finds the ruling in *Graff v. City of Chicago*, 9 F.3d 1309, (7th Cir., 1993) supports the court's conclusion.

Plaintiff at the time of the Board hearing raised the due process issue concerning an impartial tribunal. Plaintiff specifically challenged Mayor Opel and Alderman Seidl because the two had "participated" in the Common Council meetings which passed a resolution denying plaintiff's renewal of the license. Counsel for the plaintiff argued that the Mayor and alderman were there:

> "The fact is he was there. The fact is he heard the debate. The fact is that he had this collegial association with the rest of the Common Council as did your Honor, the Mayor." (Transcript of April 12, 1996, page 14).

The members of the board responded to the challenge. The court finds that none of the cases cited by the plaintiff in this regard bear upon the situation presented. Upon review of the *DeLuca v. Common Council* decision at 72 Wis. 2d, 672 (1976), this court finds that plaintiff was not denied an impartial decision maker for the following reasons:

(1) Mayor Opel and Alderman Seidl were not reviewing their own decisions because they had not presented, argued, or voted on the Resolution in question.

(2) The Mayor was obliged by statute to conduct Common Council meetings as part of her duties and the city's rules of order; likewise, the alderman was obligated to attend the Council meetings.

(3) The Mayor and the alderman sit on the administrative review board pursuant to the city's ordinances; they are not volunteers.

(4) The Mayor as part of municipal procedure always signs, along with the clerk, any resolution of the Common Council. This activity is administrative in nature to provide authenticity to the document, not to pass on the merits of the legislation. This procedure is followed for resolutions and ordinances in most municipalities.

(5) Nothing in the record shows that the two individuals should be disqualified or precluded from the

administrative review board by prior conduct. There is no prohibition or disqualification in that the adjudicators heard the details of the Resolution (allegations) or the debate involving said Resolution.

(6) While the *DeLuca* case rejected a finding using hindsight, for completeness sake this court notes that Mayor Opel conducted the protracted and often contentious hearing in a fair and proper manner. She often deferred to and looked for guidance from the legal counsel for the board. Nothing in the questions or statements by either the Mayor or Alderman Seidl demonstrate partiality or a closed mind to the plaintiff's positions.

The plaintiff contends that the review board found that the plaintiff had committed a violation of the open booth provision on a totally different date than alleged in the Resolution. The Resolution of December 19, 1995, indicates that:

> WHEREAS on "November 30, 1994, December 1, 1994, and December 2, 1994, City News & Novelty, Inc., through its employees and/or agents violated the provisions of section 8.195(9) (b) (3) of the Waukesha Municipal Code by failing to have every booth, room, or cubicle totally open to a public lighted aisle so that permitting an unobstructed view of all times of anyone occupying same.
>
> WHEREAS each of the violations set forth above resulted in five convictions in municipal courts in the city of Waukesha during 1995 license year.

At the hearing, Marv Lemke, house inspector for the city, testified that his recollection was that on November 7, 1994, the booths had been improperly narrowed; that

on either November 9 or 10 he dropped off some literature with a Mr. Bishop at the establishment and observed that the booths were not in compliance. His testimony at the hearing further indicated he recalls dropping off some literature on November 28 and again observing the booths not in compliance. He further testified at the hearing that on November 30 his inspection of the establishment indicated the booths had been cut back as well as an observation on December 9 that the booths had been cut back. (April 2, 1996, transcript pages 280-282). Plaintiff further introduced Exhibits 24 and 25 which represent memos made Lemke on March 29, 1996, and 12-9-1994 respectively. The Board in its findings and conclusions found that the open booth violation had occurred on November 7, 1994, the date of Inspector Lemke's first visit (Section 16 B.1 page 8 and 9). Because City News and Novelty was given no notice that a violation was alleged to have occurred on November 7, 1995, and because the plaintiff never received the citation for a problem on November 7, notice of this violation was not given and constitutes unlawful action by the Board and an improper basis for denying renewal of license.

The court concludes that the plaintiff had been notified with sufficient and reasonable particularity regarding the times and dates of offenses sufficient to meet the accusations and prepare to defend against it for the following reasons:

(1) Plaintiff admits in their brief on page 27 that they had received citations for activities on November 30, 1994, and subsequent dates involving the booths and had been convicted in municipal court in 1995 based on testimony from Inspector Lemke.

(2) The Resolution refers to the citations and the particular section involving the booths that the city was concerned about. The record indicates that Inspector Lemke has conversations about the booths with employees of City News & Novelty in November and December of 1994.

(3) These contacts referred to wooden panels observed affixed to the booths at the rear of plaintiff's store during November of 1994.

(4) The plaintiff has made no showing that he has been unable to respond or prevented from mounting a defense to the existence or nonexistence of wooden infringements on the sides of the booths.

Plaintiff cites evidence that was introduced at the administrative review hearing which were beyond the allegations set out in December 19, 1995, Resolution. These consist of the board hearing the testimony of Timothy Morgan regarding an incident on March 7, 1976, not referred to in the Resolution. Plaintiff also criticizes the receipt of the following exhibits: No. 33, a witness statement taken by Officer Conkle of Sonny Dietscher; No. 43, the record of conviction for Timothy Morgan for retail theft; Exhibit 35, a subpoena for a David Hull; Exhibit 36, a copy of the complaint of a 1990 lawsuit involving the plaintiff; Exhibit 37, the citation issued to a Jaimie Barr in April of 1994 for sale or displays of sexual materials to a minor. The court finds that the testimony of Timothy Morgan was objected to by plaintiff's counsel in a timely fashion as were the other exhibits listed above. With respect to Mr. Morgan and all of the exhibits listed, the decision of the board did not include any findings with

respect to the credibility of Mr. Hull or Mr. Morgan and did not make any findings with respect to the exhibits objected to by the plaintiff. The rulings of the Administrative Review Board indicate that they relief on the testimony of police officers and their observations concerning activities of minors and others at the plaintiff's store. The Board found that the testimony of the officers was unrefuted. Nowhere in the record does the court glean that the introduction of these exhibits and the testimony of Mr. Morgan were considered as a basis for denial and therefore the opportunity and elements of due process with respect to notice have not been violated. Indeed the Board kept within the allegations of which City News & Novelty had prior notice.

The plaintiff argues that the license should have been suspended rather than denied. The matter of whether to suspend rather than deny renewal is a matter within the discretion of the licensing authority. The court cannot substitute or exercise its own discretion on certiorari review. The number, nature and timing of the violations found by the Board gave a reasonable basis for the denial of the plaintiff's renewal application. Because there have been no recent violations, the Board could have ruled otherwise; they chose not to do so.

The last complaint of the plaintiff is that the evidence on which the nonrenewal was affirmed was inadequate as a matter of law. The court disagrees with plaintiff's analysis that the actions of patrons cannot be grounds for disqualification. Sections 8.195(9) (c), (10) (b) and (10) (f) apply to hold the operator responsible for activity observed by Officers Gibbs and De Jarlais at City News & Novelty. Plaintiff attacks the Board's "findings" with

respect to minors being present in the store. Because the plaintiff has not been convicted, even in municipal court, the evidence cannot serve as a basis for the denial of a license. The record is supported by substantial evidence that the minors were allowed to loiter around or frequent the store. The evidence for the finding of responsibility of the operator under 8.195(10) (c) and (b) comes from the line of testimony of four police officers. The Board's factual findings are supported by substantial and credible evidence in the record. This court concludes that the facts of record constitute violations of the ordinance as specified by the Board.

Plaintiff argues in his brief that the citations issued to Peggy Lindsley, employee, and Daniel Bishop, a director of City News & Novelty, are on appeal. Plaintiff later notes in a letter that the convictions have been vacated. The court on certiorari cannot add to the record or take new evidence except in unusual circumstances. This court concludes that the issuance of the citations revolve around police officers observing a patron who was a minor on December 24, 1994. There is not subjective discretion exercised by Officer Piagentini when he testifies to the fact a patron at the store was a minor; there is no subjective discretion exercised by the Board in finding the testimony credible.

The court concludes that the ordinance in question survives the constitutional challenges brought by the plaintiff; that plaintiff, was accorded due process with respect to the hearings before the Administrative Review Board; and finds that the evidence upon which the Review Board's findings are based represents relative and probative evidence. Such evidence that a fact-finder

could base conclusions that violations of the ordinance had occurred and that the Council was empowered to deny renewal of plaintiff's license. Accordingly the court affirms the decision of the Administrative Review Board for the City of Waukesha.

By the Court:

/s/ Robert G. Mawdsley
Robert G. Mawdsley
4/2/97

CITY OF WAUKESHA
ADMINISTRATIVE REVIEW APPEALS BOARD

RE: IN THE MATTER OF THE NONRENEWAL OF ADULT ORIENTED ESTABLISHMENT LICENSE OF CITY NEWS AND NOVELTY, INC.

FINDINGS, CONCLUSIONS AND DECISION

---

1. On November 15, 1995, City News and Novelty, Inc. applied to renew its adult oriented establishment license under the provisions of Section 8.195 of the Municipal Code of Waukesha for the license year commencing January 26, 1996. City News and Novelty, Inc., is the corporate licensee and operator of the adult oriented establishment located at 245 W. Main Street in the City of Waukesha. City News and Novelty, Inc. is subject to the provisions of Section 8.195 of the Municipal Code of Waukesha.

2. On December 19, 1995, the Common Council of the City of Waukesha passed Resolution R88-95 in which it determined not to renew the adult oriented establishment license of City News and Novelty, Inc. issued under the provisions of Section 8.195 of the Municipal Code of Waukesha.

3. Pursuant to Section 68.08, Wis. Stats., a request was made by City News and Novelty, Inc. to and for the Common Council to review its December 19, 1995 Initial Determination.

4. On January 22, 1996, the Common Council rendered by motion duly made, seconded and unanimously adopted a Decision on Review issued by letter dated January 23, 1996, in which it affirmed its December 19, 1995 Initial Determination.

5. Pursuant to Section 68.10, Wis. Stats., City News and Novelty, Inc. appealed the Decision on Review

issued by the Common Council to the City of Waukesha Administrative Review Appeals Board (hereinafter "the Board").

6. City News and Novelty, Inc. waived the time periods for this administrative review pursuant to Section 68.11, Wis. Stats., and the time period for the Board to make a final determination pursuant to Section 68.12, Wis. Stats.

7. Pursuant to Section 68.12, Wis. Stats. and Section 2.11 of the Municipal Code of Waukesha, an administrative hearing was held before the Board on April 2 and 9, and May 7 and 8, 1996 and the Board deliberated the case on June 10, 18, 25 and 28, 1996. The Common Council was represented by City Attorney Curt Meitz, City News and Novelty, Inc., the operator and licensee, was represented by attorneys Jeff Scott Olson and Percy Julian and the Board, comprised of Mayor Carol A. Opel, Ralph M. North III, and Alderman Jerome A. Seidl, was represented by Attorney John P. Macy.

   The hearing was transcribed by a court reporter, witnesses were sworn, exhibits marked and preserved, and attorneys were allowed to cross examine witnesses called by the opposing side.

8. Prior to the testimony being heard, City News and Novelty, Inc. challenged the impartiality of Mayor Opel and Ald. Seidl and requested that they disqualify themselves from hearing this appeal. Both Mayor Opel and Ald. Seidl find that they did not vote upon any decision or participate in any discussion made by the Common Council in rendering its Initial Decision and Determination on Review. Further, they both find that they are not prejudiced in this matter and are impartial decision makers. Therefore, the Board rejects the challenge of City News and Novelty, Inc. in this regard.

9. Prior to the testimony being heard, the parties stipulated to the following:

   A. Request for Review of Initial Determination was timely filed.

   B. Request to appeal the Decision of Review was timely filed.

   C. Hearing has been timely scheduled.

   D. All notice requirements have been satisfied.

   E. The court reporter would swear in the witnesses.

10. Prior to the testimony being heard, City News and Novelty, Inc. questioned the order of the hearing. The Board ruled that the Applicant would go first.

11. Prior to the testimony being heard, City News and Novelty, Inc. asked that the Board make a determination that the Common Council has the burden of proof in this matter. The Board took the issue under advisement.

12. Pursuant to Section 8.195 Municipal Code of Waukesha the purpose and rationale of licensing adult oriented establishments are as set forth in the preamble of Section 8.195 of the Municipal Code of Waukesha and are to combat and curb the adverse secondary effects brought on by adult oriented establishments; to protect the health, safety and welfare of the citizens of Waukesha from increased crime including sex related crimes; to preserve and stabilize its neighborhoods and to minimize the transmission of sexual diseases; but not to have the purpose or effect of imposing a limitation or restriction on the content of any communicative materials. Secondary effects of adult oriented establishments include contributing to physical deterioration and

blight of a neighborhood, a deleterious effect on both existing businesses around adult oriented establishments and surrounding residential areas, including increased transience and increased levels of criminal activities, including sex related crimes. In addition, studies from other communities relied upon by the Common Council found that viewing booths in adult oriented establishments have been and are being used by patrons of said establishments for engaging in sexual acts resulting in unsafe and unsanitary conditions in said booths.

13. Pursuant to Section 8.195 of the Municipal Code of Waukesha, the standards for issuance of license (i.e., to receive a new or renewal license to operate) are as set forth in Subsection 8.195 (4).

14. In that City News and Novelty, Inc. is a corporation, the standards for renewal are as set forth in Subsection 8.195 (4)(b) of the Municipal Code of Waukesha.

15. There is no evidence that there is a violation of Subsection 8.195 (4)(b)1 of the Municipal Code of Waukesha which requires that all officers, directors and stockholders required to be named under Subsection 8.195(3)(b) of the Municipal Code of the Waukesha shall be at least 18 years of age.

16. There is evidence that there are violations of Subsection 8.195 (4)(b)2 of the Municipal Code of Waukesha which requires that officers, directors or stockholders required to be named under Subsection 8.195 (3)(b) of the Municipal Code of Waukesha have violated Subsections of Section 8.195 of the Municipal Code of Waukesha within 5 years immediately preceding the date of the application.

   A. Subsection 8.195 (10)(c) of the Municipal Code of Waukesha has been violated since it provides

that no employee of an adult oriented establishment shall allow any minor to loiter around or frequent in an adult oriented establishment or allow a minor to view adult entertainment as defined herein. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(b) provides that any act or omission of an employee constituting a violation of the provisions of Section 8.195 shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed and because operator is defined in Section 8.195 of the Municipal Code of Waukesha as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds the following specific violations:

1. On December 24, 1994, Officer Richard Piagentini observed a patron at City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Piagentini made the observation while on patrol. Peggy Lindsley, the employee on duty at the time, and Daniel Bishop, a director of City News and Novelty, Inc., were both convicted of civil ordinance violations contrary to Section 8.195. Subsection 8.195(10)(c) of the Municipal Code of Waukesha on August 23, 1995. There was no evidence to refute the credible testimony of Officer Piagentini.

2. On July 23, 1995, Officer John Konkol observed S.S., a patron, at City News and Novelty, Inc. at 245 W. Main Street in the

City of Waukesha, who was a minor. Officer Konkol made the observation while on duty. Additionally, S.S. testified that she was a patron at City News and Novelty, Inc. at 245 W. Main Street in the City on July 23, 1995 and on said date she was a minor. Christopher Alverson, the employee on duty at the time, was convicted of a civil ordinance violation contrary to Section 8.195, Subsection 8.195(10(c) of the Municipal Code of Waukesha on August 25, 1995. There was no evidence to refute the credible testimony of Officer Konkol or S.S.

3. On October 18, 1995, Officer Mark Howard, observed S.D., a patron, at City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Howard made the observation during the course of a routine investigation. Additionally, S.D. testified that he was a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha on October 18, 1995 and on said date he was a minor. There was no evidence to refute the credible testimony of Officer Howard and S.D.

4. On November 29, 1995, Officer Paul Paikowski observed a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, who was a minor. Officer Paikowski made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There was no evidence to refute the credible testimony of Officer Paikowski.

B. Subsection 8.195(9) of the Municipal Code of Waukesha has been violated since Subsection 8.195(9)(b)2 requires that every booth, room or cubicle shall have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(f) states that the operator shall insure compliance of the establishment and its patrons with the provisions of Section 8.195 of the Municipal Code of Waukesha and operator is defined as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds that the following specific violation:

1. On November 7, 1994, Building Inspector Marv Lemke observed at 245 W. Main Street in the City of Waukesha that wood panels had been installed perpendicular to the front of the interior partition of viewing booths between 9 and 11 inches in width having the effect of narrowing the booth openings by approximately 1/3 since his previous inspection the year before. The wood panels narrowed the opening of the booths and obstructed the view of someone looking into the booth contrary to the requirement that at least one side be totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same. The wood panels were not necessary for the structural stability of the booth. Daniel L. Bishop, a director of City News and Novelty, Inc. was convicted

of three (3) civil ordinance violations contrary to Section 8.195, Subsection 8.195(9)(b)(2) of the Municipal Code of Waukesha on August 23, 1995. There was no evidence to refute the credible testimony of Building Inspector Lemke.

C. Subsection 8.195(9) of the Municipal Code of Waukesha has been violated since Subsection 8.195(9)(c) requires that no occupants of a booth, room or cubicle shall engage in any type of sexual activity. A violation of this Subsection is a basis for nonrenewal of a license issued under Section 8.195 because Subsection 8.195 (10)(f) states that the operator shall insure compliance of the establishment and its patrons with the provisions of Section 8.195 of the Municipal Code of Waukesha and operator is defined as any person, partnership, or corporation operating, conducting, maintaining or owning any adult oriented establishment. The Board finds the following specific violations:

1. On February 28, 1995, Officer John Gibbs observed a patron of City News and Novelty, Inc. at 245 W. Main Street in the City of Waukesha, masturbating in a viewing booth. Officer Gibbs made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20 Wis. Stats. There was no testimony presented to refute the credible testimony of Officer Gibbs.

2. On March 11, 1995, Officer Paul De Jarlais observed a patron at City News and Novelty, Inc. at 245 W. Main St. in the City of Waukesha, masturbating in a viewing booth. Officer De Jarlais made these observations as a result of a routine inspection of the premises. He was not called to the scene by an employee of City News and Novelty, Inc. There were no employees in the booth area when the Officer made his observation. The patron was convicted of the criminal charge of lewd and lascivious conduct contrary to Section 944.20, Wis. Stats. There was no testimony presented to refute the credible testimony of Officer De Jarlais.

17. In consideration of the issue of which party bears the burden of proof, the Board concludes that City News and Novelty, Inc., as applicant, had an initial burden of showing, as a minimum, that all jurisdictional requirements to effectuate an appeal to the Board pursuant to Chapter 68, Wisconsin Statutes, were satisfied.

18. In consideration of the issue of which party bears the ultimate burden of proof, the Board has considered special policy considerations, judicial estimate of probabilities, convenience, fairness factors and the natural tendency to place the burden on the party desiring change. The Common Council has permitted City News and Novelty, Inc. to continue its business operation pending the determination of the Board after a due process hearing. Therefore, the City desires a change in the status quo. Moreover, special policy considerations argue strongly in favor of requiring the City to set out facts in support of the Common Council's decision not to renew. The City has the convenience of facts at its command and is

able to provide the Board with information in support of its belief that nonrenewal is appropriate. Finally, the notion of requiring a party to prove lack of violations is of questionable fairness. Therefore, the Board concludes that the City bears the ultimate burden of proof.

19. The Board further concludes that, irrespective of the order of proof during the hearing, all due process requirements have been satisfied in that both parties were afforded full opportunity to present any and all evidence in support of their respective positions; neither party was prejudiced in any manner by the order of proof; and the hearing afforded both parties a constitutionally sufficient, fair and orderly administrative procedure to review the determination of the Common Council.

20. Based on the foregoing findings and conclusions and all of the documentation and testimonial evidence, the Board decides that there is substantial evidence in the record and a reasonable basis to conclude that the decision of the Common Council be upheld and that the adult-oriented establishment license of City News and Novelty, Inc. not be renewed for the license year 1996. The Board, therefore, affirms that decision.

These Findings, Conclusions and Decision of the City of Waukesha Administrative Review Appeals Board are unanimously adopted this 28th day of June, 1996.

/s/ Carol A. Opel
Carol A. Opel, Mayor

/s/ Jerome A. Seidl
Jerome A. Seidl, Alderman

/s/ Ralph M. North III
Ralph M. North III, Citizen

CITY OF WAUKESHA
CITY COUNSEL

RE: IN THE MATTER OF THE NONRENEWAL OF ADULT ORIENTED ESTABLISHMENT LICENSE OF CITY NEWS AND NOVELTY, INC.

RESOLUTION

WHEREAS, City News and Novelty, Inc. is licensed to operate an adult oriented establishment pursuant to the provisions of section 8.195 of the Waukesha Municipal Code at 245 W. Main Street, Waukesha, Wisconsin, for the license year commencing January 26, 1995 and expiring on January 25, 1996; and

WHEREAS, on 12/24/94 City News and Novelty, Inc. through its employees and/or agents permitted minors to loiter contrary to the provisions of section 8.195(10) of the Waukesha Municipal Code; and

WHEREAS, on 11/30/94, 12/1/94 and 12/2/94 City News and Novelty, Inc. through its employees and/or agents violated the provisions of section 8.195(9)(b)2 of the Waukesha Municipal Code by failing to have every booth, room or cubical totally open to a public lighted aisle so that permitting an unobstructed view at all times of anyone occupying the same; and

WHEREAS, each of the violations set forth above resulted in five (5) convictions in Municipal Court in the City of Waukesha during the 1995 license year; and

WHEREAS, on July 23, 1995, October 18, 1995, and November 29, 1995, minors were permitted to loiter on

the subject premises contrary to section 8.195(10) of the Waukesha Municipal Code; and

WHEREAS, on 9/12/94 a patron of City News and Novelty, Inc. was arrested for exposing himself to an employee. The patron was convicted of the criminal charge of lewd and lacivious [sic] conduct on April 12, 1995 contrary to section 944.20 of the Wisconsin Statutes; and

WHEREAS, on 2/28/95 a patron of City News and Novelty, Inc. engaged in sexual conduct inside a viewing booth and was observed by a police officer. The patron was convicted of lewd and lascivious conduct on 11/2/95 contrary to section 944.20 of the Wisconsin Statutes. This activity is also contrary to the provision of section 8.195(9)(c) of the Waukesha Municipal Code; and

WHEREAS, on 3/12/95 a patron of City News and Novelty, Inc. engaged in sexual conduct inside a viewing booth and was observed by a police officer. The patron was convicted of lewd and lascivious conduct on 12/1/95 contrary to section 944.20 of the Wisconsin Statutes. This activity is also contrary to the provision of section 8.195(9)(c) of the Waukesha Municipal Code.

NOW, THEREFORE, BE IT RESOLVED that based upon the aforementioned convictions and violations, and sexual activity occurring in the viewing booths on the premises which occurred during the license year 1995, the Common Council of the City of Waukesha and hereby denies the renewal of an Adult Oriented Establishment License for City News and Novelty, Inc. for the license year 1996 commencing January 26, 1996.

BE IT FURTHER RESOLVED, that City News and Novelty has the right to have this determination reviewed within 30 days of receipt of this notice by requesting a review by the Common Council. The request for review shall be submitted to the City Clerk and shall state the grounds upon which City News and Novelty, Inc. contends that the determination should be modified or reversed.

BE IT FURTHER RESOLVED, that the procedures and provisions of sec. 68.08 through 68.12 of the Wisconsin Statutes and sec. 2.11 of the Waukesha Municipal Code shall apply in the review process of this determination.

Approved this 19th day of December, 1995.

/s/ Carol A. Opel
Carol A. Opel, Mayor

Attest:

/s/ Thomas E. Neill
Tom Neill
Clerk/Treasurer

CHAPTER 68

MUNICIPAL ADMINISTRATIVE PROCEDURE

68.001 Legislative purpose.
68.01 Review of administrative determinations.
68.02 Determinations reviewable.
68.03 Determinations not subject to review.
68.04 Municipalities included.
68.05 Municipal authority defined.
68.06 Persons aggrieved.
68.07 Reducing determination to writing.
68.08 Request for review of determination.
68.09 Review of determination.
68.10 Administrative appeal.
68.11 Hearing on administrative appeal.
68.12 Final determination.
68.13 Judicial review.
68.14 Legislative review.
68.15 Availability of methods of resolving disputes.
68.16 Election not to be governed by this chapter.

68.001 Legislative purpose. The purpose of this chapter is to afford a constitutionally sufficient, fair and orderly administrative procedure and review in connection with determinations by municipal authorities which involve constitutionally protected rights of specific persons which are entitled to due process protection under the 14th amendment to the U.S. constitution.

History: 1975 c. 295.

Investigatory and adjudicatory functions in administrative proceedings discussed. State ex rel. DeLuca v. Common Council, 72 W. 2d 672, 242 N.W.2d 689.

68.01 Review of administrative determinations. Any person having a substantial interest which is

adversely affected by an administrative determination of a governing body, board, commission, committee, agency, officer or employe of a municipality or agent acting on behalf of a municipality as set forth in s. 68.02, may have such determination reviewed as provided in this chapter. The remedies under this chapter shall not be exclusive. No department, board, commission, agency, officer or employe of a municipality who is aggrieved may initiate review under this chapter of a determination of any other department, board, commission, agency, officer or employe of the same municipality, but may respond or intervene in a review proceeding under this chapter initiated by another.

History: 1975 c. 295.

68.02 Determinations reviewable. The following determinations are reviewable under this chapter:

(1) The grant or denial in whole or in part after application of an initial permit, license, right, privilege, or authority, except an alcohol beverage license.

(2) The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in s. 68.03 (5).

(3) The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant.

(4) The imposition of a penalty or sanction upon any person except a municipal employe or officer, other than by a court.

History: 1975 c. 295; 1981 c. 79.

68.03 Determinations not subject to review. Except as provided in s. 68.02, the following determinations are not reviewable under this chapter:

(1) A legislative enactment. A legislative enactment is an ordinance, resolution or adopted motion of the governing body of a municipality.

(2) Any action subject to administrative or judicial review procedures under other statutes.

(3) The denial of a tort or contract claim for money, required to be filed with the municipality pursuant to statutory procedures for the filing of such claims.

(4) The suspension, removal or disciplining or nonrenewal of a contract of a municipal employe or officer.

(5) The grant, denial, suspension or revocation of an alcohol beverage license under s. 125.12 (1).

(6) Judgments and orders of a court.

(7) Determinations made during municipal labor negotiations.

(8) Any action which is subject to administrative review procedures under an ordinance providing such procedures as defined in s. 68.16.

(9) Notwithstanding any other provision of this chapter, any action or determination of a municipal authority which does not involve the constitutionally protected right of a specific person or persons to due process in connection with the action or determination.

History: 1975 c. 295; 1981 c. 79.

68.04 Municipalities included. "Municipality", as used in this chapter, includes any county, city, village, town, technical college district, special purpose district or board or commission thereof, and any public or quasi-public corporation or board or commission created pursuant to statute, ordinance or resolution, but does not include the state, a state agency, a corporation chartered by the state or a school district as defined in s. 115.01 (3).

History: 1975 c. 295; 1993 a. 399.

68.05 Municipal authority defined. "Municipal authority" includes every municipality and governing body, board, commission, committee, agency, officer, employe, or agent thereof making a determination under s. 68.01, and every person, committee or agency of a municipality appointed to make an independent review under s. 68.09 (2).

History: 1975 c. 295.

68.06 Persons aggrieved. A person aggrieved includes any individual, partnership, limited liability company, corporation, association, public or private organization, officer, department, board, commission or agency of the municipality, whose rights, duties or privileges are adversely affected by a determination of a municipal authority.

History: 1975 c. 295; 1993 a. 112.

68.07 Reducing determination to writing. If a determination subject to this chapter is made orally or, if in writing, does not state the reasons therefor, the municipal authority making such determination shall, upon

written request of any person aggrieved by such determination made within 10 days of notice of such determination, reduce the determination and the reasons therefor to writing and mail or deliver such determination and reasons to the person making the request. The determination shall be dated, and shall advise such person of the right to have such determination reviewed, the time within which such review may be obtained, and the office or person to whom a request for review shall be addressed.

History: 1975 c. 295, 421.

68.08 Request for review of determination. Any person aggrieved may have a written or oral determination reviewed by written request mailed or delivered to the municipal authority which made such determination within 30 days of notice to such person of such determination. The request for review shall state the ground or grounds upon which the person aggrieved contends that the decision should be modified or reversed. A request for review shall be made to the officer, employe, agent, agency, committee, board, commission or body who made the determination but failure to make such request to the proper party shall not preclude the person aggrieved from review unless such failure has caused prejudice to the municipal authority.

History: 1975 c. 295.

68.09 Review of determination. (1) INITIAL DETERMINATION. If a request for review is made under s. 68.08, the determination to be reviewed shall be termed an initial determination.

(2) WHO SHALL MAKE REVIEW. A review under this section may be made by the officer, employe, agent, agency, committee, board, commission or body who made the initial determination. However, an independent review of such initial determination by another person, committee or agency of the municipality may be provided by the municipality.

(3) WHEN TO MAKE REVIEW. The municipal authority shall review the initial determination within 15 days of receipt of a request for review. The time for review may be extended by agreement with the person aggrieved.

(4) RIGHT TO PRESENT EVIDENCE AND ARGUMENT. The person aggrieved may file with the request for review or within the time agreed with the municipal authority written evidence and argument in support of the person's position with respect to the initial determination.

(5) DECISION ON REVIEW. The municipal authority may affirm, reverse or modify the initial determination and shall mail or deliver to the person aggrieved a copy of the municipal authority's decision on review, which shall state the reasons for such decision. The decision shall advise the person aggrieved of the right to appeal the decision, the time within which appeal shall be taken and the office or person with whom notice of appeal shall be filed.

History: 1975 c. 295, 421.

68.10 Administrative appeal. (1) FROM INITIAL DETERMINATION OR DECISION ON REVIEW. (a) If the person aggrieved did not have a hearing substantially in compliance with s.

68.11 when the initial determination was made, the person may appeal under this section from the decision on review and shall follow the procedures set forth in ss. 68.08 and 68.09.

(b) If the person aggrieved had a hearing substantially in compliance with s. 68.11 when the initial determination was made, the person may elect to follow the procedures provided in ss. 68.08 and 68.09, but is not entitled to appeal under this section unless granted by the municipal authority. The person may, however, seek review under s. 68.13.

(2) TIME WITHIN WHICH APPEAL MAY BE TAKEN UNDER THIS SECTION. Appeal from a decision on review under s. 68.09 shall be taken within 30 days of notice of such decision.

(3) HOW APPEAL MAY BE TAKEN. An appeal under this section may be taken by filing with or mailing to the office or person designated in the municipal authority's decision on review, written notice of appeal.

History: 1975 c. 295, 421.

68.11 Hearing on administrative appeal. (1) TIME OF HEARING. The municipality shall provide the appellant a hearing on an appeal under s. 68.10 within 15 days of receipt of the notice of appeal filed or mailed under s. 68.10 and shall serve the appellant with notice of such hearing by mail or personal service at least 10 days before such hearing.

(2) CONDUCT OF HEARING. At the hearing, the appellant and the municipal authority may be represented by an attorney and may present evidence and call and examine witnesses and cross-examine witnesses of the other

party. Such witnesses shall be sworn by the person conducting the hearing. The municipality shall provide an impartial decision maker, who may be an officer, committee, board, commission or the governing body who did not participate in making or reviewing the initial determination, who shall make the decision on administrative appeal. The decision maker may issue subpoenas. An appellant's attorney of record may issue a subpoena to compel the attendance of a witness or the production of evidence. A subpoena issued by an attorney must be in substantially the same form as provided in s. 805.07 (4) and must be served in the manner provided in s. 805.07 (5). The attorney shall, at the time of issuance, send a copy of the subpoena to the decision maker. The hearing may, however, be conducted by an impartial person, committee, board or commission designated to conduct the hearing and report to the decision maker.

(3) RECORD OF HEARING. The person conducting the hearing or a person employed for that purpose shall take notes of the testimony and shall mark and preserve all exhibits. The person conducting the hearing may, and upon request of the appellant shall, cause the proceedings to be taken by a stenographer or by a recording device, the expense thereof to be paid by the municipality.

History: 1975 c. 295; 1989 a. 139.

68.12 Final determination. (1) Within 20 days of completion of the hearing conducted under s. 68.11 and the filing of briefs, if any, the decision maker shall mail or deliver to the appellant its written determination stating the reasons therefor. Such determination shall be a final determination.

(2) A determination following a hearing substantially meeting the requirements of s. 68.11 or a decision on review under s. 68.09 following such hearing shall also be a final determination.

History: 1975 c. 295.

68.13 Judicial review. (1) Any party to a proceeding resulting in a final determination may seek review thereof by certiorari within 30 days of receipt of the final determination. The court may affirm or reverse the final determination, or remand to the decision maker for further proceedings consistent with the court's decision.

(2) If review is sought of a final determination, the record of the proceedings shall be transcribed at the expense of the person seeking review. A transcript shall be supplied to anyone requesting the same at the requester's expense. If the person seeking review establishes impecuniousness to the satisfaction of the reviewing court, the court may order the proceedings transcribed at the expense of the municipality and the person seeking review shall be furnished a free copy of the transcript. By stipulation, the court may order a synopsis of the proceedings in lieu of a transcript. The court may otherwise limit the requirement for a transcript.

History: 1975 c. 295, 421; 1981 c. 289.

Judicial Council Note, 1981: Reference in sub. (1) to a "writ" of certiorari has been removed because that remedy is now available in an ordinary action. See s. 781.01, stats., and the note thereto. [Bill 613-A]

68.14 Legislative review. (1) The seeking of a review pursuant to s. 68.10 or 68.13 does not preclude a

person aggrieved from seeking relief from the governing body of the municipality or any of its boards, commissions, committees, or agencies which may have jurisdiction.

(2) If in the course of legislative review under this section, a determination is modified, such modification and any evidence adduced before the governing body, board, commission, committee or agency shall be made part of the record on review under s. 68.13.

(3) The governing body, board, commission, committee or agency conducting a legislative review under this section need not conduct the type of hearing required under s. 68.11.

History: 1975 c. 295.

68.15 Availability of methods of resolving disputes. This chapter does not preclude any municipality and person aggrieved from employing arbitration, mediation or other methods of resolving disputes, and does not supersede contractual provisions for that purpose.

History: 1975 c. 295.

68.16 Election not to be governed by this chapter. The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations.

History: 1975 c. 295.

8.195 Adult Oriented Establishments

(as of December 19, 1995)

WHEREAS, it is a lawful purpose of the Common Council for the City of Waukesha to enact regulatory ordinances protecting and promoting the general welfare, health and safety of its citizens; and

WHEREAS, the City is empowered to enact such ordinances pursuant to the Constitution and Laws of the State of Wisconsin; and

WHEREAS, the Common Council, based on the experience of other cities including Seattle and Renton, Washington, and Detroit, Michigan, has previously determined as set forth in sec. 22.50 of the Waukesha Municipal Code that adult oriented establishments can contribute to the impairment of the character and quality of surrounding residential neighborhoods, and contribute to the decline and the value of surrounding properties; and

WHEREAS, further studies in other communities across the United States such as St. Paul, Minnesota; Indianapolis, Indiana; Austin, Texas and Phoenix, Arizona have documented that the secondary effects of adult oriented establishments affect property values, contribute to physical deterioration and blight, have a deleterious effect on both existing businesses around them and surrounding residential areas, including increased transiency, increased levels of criminal activities including prostitution, rape, assaults and other sex related crimes; and

WHEREAS, the Common Council believes that the experiences and studies of other communities set forth

herein are relevant in addressing the secondary effects adult oriented establishments can have upon areas surrounding such establishments in the City of Waukesha; and

WHEREAS, many adult oriented establishments install booths with doors in which patrons can view adult oriented movies or video tapes or films or view other forms of adult entertainment; and

WHEREAS, it is has been found in Milwaukee and Kenosha Counties, Wisconsin; Chattanooga, Tennessee; Newport News, Virginia; and Marion County, Indiana, to name a few locales, that the viewing booths in adult oriented establishment have been and are being used by patrons of said establishments for engaging in sexual acts, particularly between males, including but not limited to intercourse, sodomy, oral copulation and masturbation, resulting in unsafe and unsanitary conditions in said booths; and

WHEREAS, Acquired Immune Deficiency Syndrome (AIDS) is a sexually transmitted disease which destroys the body's immune system, is always fatal, and has no known cure; and

WHEREAS, when this ordinance was originally enacted in 1989, statistics from the State of Wisconsin had indicated that as of July 25, 1986, 96 cases of AIDS were reported in the State including 54 that resulted in death and that Wisconsin could expect a ten fold increase in reported cases between 1986 and 1991; and

WHEREAS, as of January 1, 1995, the State of Wisconsin Department of Health and Social Services, Division of Public Health is projecting between 900-1300 new cases of AIDS during 1995 and 1996.

WHEREAS, the viral agents responsible for AIDS and other sexually transmitted diseases have all been isolated at one time or another from semen; and

WHEREAS, the City of Waukesha desires to combat and curb the adverse secondary effects brought on by adult oriented establishments and to protect the health, safety, and welfare of its citizens from increased crime, and to preserve and stabilize the neighborhoods of the City of Waukesha, and to minimize the transmission of sexual diseases including AIDS; and

WHEREAS, although the provisions of this ordinance have neither the purpose or effect of imposing a limitation or restriction on the content of any communicative materials, the Common Council deems it to be in the interests of the City of Waukesha to provide for licensing and regulation of adult oriented establishments including, but not limited to, adult bookstores, adult minimotion picture establishments, adult motion picture theaters and adult cabarets to combat and curb the secondary effects of such establishments.

NOW, THEREFORE, the Common Council of the City of Waukesha do ordain as follows:

ADULT ORIENTED ESTABLISHMENTS.

(1) DEFINITIONS:

Adult Bookstore. An establishment which has a facility or facilities, including but not limited to booths, cubicles, rooms or stalls, for the presentation of "adult entertainment", as defined below, including adult oriented films, movies or live performances for observation by patrons therein; or an establishment having as a substantial or significant portion of its stock in trade, for sale, rent, trade, lease, inspection or viewing, books, films, video cassettes, magazines or other periodicals, which are distinguished or characterized by their emphasis on matters depicting, describing or relating to specified anatomical areas or specified sexual activities as defined below.

Adult Cabaret. A cabaret which features topless dancers, strippers, male or female impersonators or similar entertainers.

Adult Entertainment. Any exhibition of any motion picture, live performance, display or dance of any type, which has as its dominant theme or is distinguished or characterized by an emphasis on any actual or simulated specified sexual activities or specified anatomical areas as herein defined.

Adult Mini-Motion Picture Theater. An enclosed building with a capacity of less than 50 persons used for presenting material having as its dominant theme or distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as herein defined for observation by patrons therein.

Adult Motion Picture Theater. An enclosed building with a capacity of 50 or more persons used for presenting material having as its dominant theme or distinguished or characterized by an emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as defined below for observation by patrons therein.

Adult Oriented Establishment. Any premises including, but not limited to, "adult bookstores", "adult motion picture theaters", "adult mini-motion picture establishments" or "adult cabarets." It further means any premises to which public patrons or members are invited or admitted and which are so physically arranged so as to provide booths, cubicles, rooms, compartments, or stalls separate from the common area of the premises for the purposes of viewing adult oriented motion pictures, or wherein an entertainer provides adult entertainment to a member of the public, a patron or a member, whether or not such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect. "Adult Oriented Establishment" further includes without being limited to any "adult entertainment studio" or any premises that is physically arranged and used as such whether advertised or represented as an adult entertainment studio, rap studio, exotic dance studio, encounter studio, sensitivity studio, modeling studio, or any other term of like import.

"Booths", "Cubicles", "Rooms", "Compartments" or "Stalls". Enclosures as are specifically offered to the public or members of an adult-oriented establishment for hire or for a fee as part of a business operated on the premises which offers as part of its business the entertainment to

be viewed within the enclosure. This shall include, without limitation, such enclosures wherein the entertainment is dispensed for a fee, but a fee is not charged for mere access to the enclosure. However, "booth", "cubicle", "room", "compartment" or "stall" does not mean such enclosures that are private offices used by the owners, managers or persons employed on the premises for attending to the tasks of their employment, which enclosures are not held out to the public or members of the establishment for hire or for a fee or for the purpose of viewing entertainment for a fee, are not open to any persons other than employees; nor shall this definition apply to hotels, motels or other similar establishments licensed by the State of Wisconsin pursuant to Chapter 50 of the Wisconsin Statutes.

Council. The City Council for the City of Waukesha, Waukesha County, Wisconsin.

Operators. Any person, partnership, or corporation operating, conducting, maintaining or owning any adult-oriented establishment.

Specified Anatomical Areas.

1. Less than completely and opaquely covered human genitals, pubic region, buttocks, and female breasts below the point immediately above the top of the areola.

2. Human male genitals in a discernible turgid state, even if opaquely covered.

Specified Sexual Activities. Simulated or actual:

1. Showing of human genitals in a state of sexual stimulation or arousal.

2. Acts of masturbation, sexual intercourse, sodomy, bestiality, necrophilia, sado-masochistic abuse, fellatio or cunnilingus.

3. Fondling or erotic touching of human genitals, pubic region, buttocks or female breasts.

(2) LICENSE.

(a) Except as provided in subsection (d) below, from and after the effective date of this section, no adult oriented establishment shall be operated or maintained in the City without first obtaining a license to operate issued by the City.

(b) A license may be issued only for one adult oriented establishment located at a fixed and certain place. Any person who desires to operate more than one adult oriented establishment must have a license for each.

(c) No license or interest in a license may be transferred to any person.

(d) All adult oriented establishments existing at the time of the passage of this section must submit an application for a license within 60 days of the passage of this section.

(3) APPLICATION FOR LICENSE.

(a) Any person desiring to secure a license shall make application to the City Clerk. The application shall be filed in triplicate and dated by the City Clerk. A copy of the

application shall be distributed promptly by the City Clerk to the City Police Department and to the applicant.

(b) The application for a license shall be upon a form provided by the City Clerk. An applicant for a license shall furnish the following information under oath:

1. Name and address.

2. Written proof that the individual is at least 18 years of age.

3. The address of the adult oriented establishment to be operated by the applicant.

4. If the applicant is a corporation, the application shall specify the name of the corporation, the date and state of incorporation, the name and address of the registered agents and the name and address of all shareholders owning more than 5% of the stock in such corporation and all officers and directors of the corporation.

(c) Within 21 days of receiving an application for a license, the City Clerk shall notify the applicant whether the application is granted or denied.

(d) Whenever an application is denied, the City Clerk shall advise the applicant in writing of the reasons for such action. If the applicant requests a hearing within 10 days of receipt of notification of denial, a public hearing shall be held within 10 days thereafter before the Council or its designated committee as hereinafter provided.

(e) Failure or refusal of the applicant to give any information relevant to the application or his refusal or failure to appear at any reasonable time and place for examination under oath regarding such application or his refusal to submit to or cooperate with regard to any information required by this section shall constitute an admission by the applicant that he is ineligible for such license and shall be grounds for denial thereof by the City Clerk.

(4) STANDARDS FOR ISSUANCE OF LICENSE. To receive a license to operate an adult oriented establishment, an applicant must meet the following standards:

(a) If the applicant is an individual:

1. The applicant must be at least 18 years of age.

2. The applicant shall not have been found to have previously violated this section within 5 years immediately preceding the date of the application.

(b) If the applicant is a corporation:

1. All officers, directors, and stockholders required to be named underpar. (3)(b) shall be at least 18 years of age.

2. No officer, director, or stockholder required to be named under par. (3)(b) shall have been found to have previously violated this section within 5 years immediately preceding the date of the application.

(c) If the applicant is a partnership, joint venture or any other type of organization where 2 or more persons have a financial interest:

1. All persons having a financial interest in the partnership, joint venture or other type of organization shall be at least 18 years of age.

2. No person having a financial interest in the partnership, joint venture or other type of organization shall have been found to have violated any provision of this section within 5 years immediately preceding the date of the application.

(5) FEES. A license fee of $250 shall be submitted with the application for a license. If the application is denied, 1/2 of the fee shall be returned.

(6) DISPLAY OF LICENSE OR PERMIT. The license shall be displayed in a conspicuous public place in the adult-oriented establishment.

(7) RENEWAL OF LICENSE OR PERMIT.

(a) Every license issued pursuant to this section will terminate at the expiration of one year from date of issuance, unless sooner revoked and must be renewed before operation is allowed in the following year. Any operator desiring to renew a license shall make application to the City Clerk. The application for renewal must be filed not later that 60 days before the license expires. The application for renewal shall be upon a form provided by the City Clerk and shall contain such information and data given under oath or affirmation as is required for an application for a new license.

(b) A license renewal fee of $250 shall be submitted with the application for renewal. In addition to the renewal fee, a late penalty of $100 shall be assessed against any applicant who files for a renewal less than 60 days before the license expires. If the application is denied, 1/2 of the total fees collected shall be returned.

(c) If the City Police Department is aware of any information bearing on the operator's qualifications, that information shall be filed in writing with the City Clerk.

(d) The building inspector shall inspect the establishment prior to the renewal of a license to determine compliance with the provisions of this ordinance.

(8) REVOCATION OF LICENSE.

(a) The Council shall revoke a license or permit for any of the following reasons:

1. Discovery that false or misleading information or data was given on any application or material facts were omitted from any application.

2. The operator or any employee of the operator violates any provision of this section or any rules or regulation adopted by the Council pursuant to this section provided, however, that in the case of a first offense by an operator where the conduct was solely that of an employee, the penalty shall not exceed a suspension of 30 days if the Council shall find that the operator had no actual or constructive knowledge of such violation and could not by the exercise of

due diligence have had such actual or constructive knowledge.

3. The operator becomes ineligible to obtain a license or permit.

4. Any cost or fee required to be paid by this Section is not paid.

5. Any intoxicating liquor or cereal malt beverage is served or consumed on the premises of the adult oriented establishment.

(b) The Council, before revoking or suspending any license or permit, all give the operator at least 10 days written notice of the charges against him and the opportunity for a public hearing before the Council or its designated committee as hereinafter provided.

(c) The transfer of a license or any interest in a license shall automatically and immediately revoke the license.

(d) Any operator whose license is revoked shall not be eligible to receive a license for one year from the date of revocation. No location or premises for which a license has been issued shall be used as an adult oriented establishment for six (6) months from the date of revocation of the license.

(9) PHYSICAL LAYOUT OF ADULT ORIENTED ESTABLISHMENT. Any adult oriented establishment having available for customers, patrons or members, any booth, room or cubicle for the private viewing of any adult entertainment must comply with the following requirements:

(a) Access. Each booth, room or cubicle shall be totally accessible to and from aisles and public areas of the adult oriented establishment and shall be unobstructed by any door, lock or other control-type devices.

(b) Construction. Every booth, room or cubicle shall meet the following construction requirements:

1. Each booth, room or cubicle shall be separated from adjacent booths, rooms or cubicles and any non-public areas by a wall.

2. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying the same.

3. All walls shall be solid and without any openings, extended from the floor to a height of not less than 6 feet and be light colored, non-absorbent, smooth textured and easily cleanable.

4. The floor must be light colored, non-absorbent, smooth textured and easily cleanable.

5. The lighting level of each booth, room or cubicle, when not in use shall be a minimum of ten foot candles at all times, as measured from the floor.

(c) Occupants. Only one individual shall occupy a booth, room or cubicle at any time. No occupants of same shall engage in any type of sexual activity, cause any bodily discharge or litter while in the booth. No individual shall damage or deface any portion of the booth.

(d) Inspections. (Cr. #5-95) The Building Inspector shall conduct monthly inspections of the premises to insure compliance with the provisions of this subsection.

(10) RESPONSIBILITIES OF THE OPERATOR.

(a) Every act or omission by an employee constituting a violation of the provisions of this Section shall be deemed the act or omission of the operator is such act or omission occurs either with the authorization, knowledge, or approval of the operator, or as a result of the operator's negligent failure to supervise the employee's conduct, and the operator shall be punishable for such act or omission in the same manner as if the operator committed the act or caused the omission.

(b) Any act or omission of any employee constituting a violation of the provisions of this section shall be deemed the act or omission of the operator for purposes of determining whether the operator's license shall be revoked, suspended or renewed.

(c) No employee of an adult oriented establishment shall allow any minor to loiter around or to frequent an adult oriented establishment or to allow any minor to view adult entertainment as defined herein.

(d) The operator shall maintain the premises in a clean and sanitary manner at all times.

(e) The operator shall maintain at least 10 foot candles of light in the public portions of the establishment, including aisles, at all times. However, if a lesser level of illumination in the aisles shall be necessary to enable a patron to

view the adult entertainment in a booth, room or cubicle adjoining an aisle, a lesser amount of illumination may be maintained in such aisles, provided, however, at no time shall there be less then one foot candle of illumination in said aisles, as measured from the floor.

(f) The operator shall insure compliance of the establishment and its patrons with the provisions of this section.

(11) ADMINISTRATIVE REVIEW PROCEDURE. The City ordinances and State law shall govern the administrative procedure and review regarding the granting, denial, renewal, nonrenewal, revocation or suspension of a license.

(12) PENALTIES AND PROSECUTION. Any person who shall violate any provisions of this Section or who shall fail to obtain a license or permit as required hereunder shall be subject to penalty as provided in § 25.05 of this Municipal Code.